

**Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes.**

(a) **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused or civil defendant.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or evidence of the aberrant sexual propensity of the accused or a civil defendant pursuant to Rule 404(c);

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) **Other crimes, wrongs, or acts.** Except as provided in Rule 404(c) evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(c) **Character evidence in sexual misconduct cases.** In a criminal case in which a defendant is charged with having committed a sexual offense, or a civil case in which a claim is predicated on a party's alleged commission of a sexual offense, evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted.

(1) In all such cases, the court shall admit evidence of the other act only if it first finds each of the following:

(A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.

(B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.

(C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:

(i) remoteness of the other act;

(ii) similarity or dissimilarity of the other act;

(iii) the strength of the evidence that defendant committed the other act;

(iv) frequency of the other acts;

(v) surrounding circumstances;

(vi) relevant intervening events;

(vii) other similarities or differences;

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(2) In all cases in which evidence of another act is admitted pursuant to this subsection, the court shall instruct the jury as to the proper use of such evidence.

(3) In all criminal cases in which the state intends to offer evidence of other acts pursuant to this subdivision of Rule 404, the state shall make disclosure to the defendant as to such acts as required by Rule 15.1, Rules of Criminal Procedure, no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause. The defendant shall make disclosure as to rebuttal evidence pertaining to such acts as required by Rule 15.2, no later than 20 days after receipt of the state's disclosure or at such other time as the court may allow for good cause. In all civil cases in which a party intends to offer evidence of other acts pursuant to this subdivision of Rule 404, the parties shall make disclosure as required by Rule 26.1, Rules of Civil Procedure, no later than 60 days prior to trial, or at such later time as the court may allow for good cause shown.

(4) As used in this subsection of Rule 404, the term "sexual offense" is as defined in A.R.S. § 13-1420(C) and, in addition, includes any offense of first-degree murder pursuant to A.R.S. § 13-1105(A)(2) of which the predicate felony is sexual conduct with a minor under § 13-1405, sexual assault under § 13-1406, or molestation of a child under § 13-1410.

### Comment to 2012 Amendment

The language of Rule 404 has not been changed in any manner.

### Comment to 1997 Amendment

Subsection (c) of Rule 404 is intended to codify and supply an analytical framework for the application of the rule created by case law in *State v. Treadaway*, 116 Ariz. 163, 568 P.2d 1061 (1977), and *State v. McFarlin*, 110 Ariz. 225, 517 P.2d 87 (1973). The rule announced in *Treadaway* and *McFarlin* and here codified is an exception to the common-law rule forbidding the use of evidence of other acts for the purpose of showing character or propensity.

Subsection (1)(B) of Rule 404(c) is intended to modify the *Treadaway* rule by permitting the court to admit evidence of remote or dissimilar other acts providing there is a "reasonable" basis, by way of expert testimony or otherwise, to support relevancy, i.e., that the commission of the other act permits an inference that defendant had an aberrant sexual propensity that makes it more probable that he or she committed the sexual offense charged. The *Treadaway* requirement that there be expert testimony in all cases of remote or dissimilar acts is hereby eliminated.

The present codification of the rule permits admission of evidence of the other act either on the basis of similarity or closeness in time, supporting expert testimony, or other reasonable basis that will support such an inference. To be admissible in a criminal case, the relevant prior bad act must be shown to have been committed by the defendant by clear and convincing evidence. *State v. Terrazas*, 189 Ariz. 580, 944 P.2d 1194 (1997).

Notwithstanding the language in *Treadaway*, the rule does not contemplate any bright line test of remoteness or similarity, which are solely factors to be considered under subsection (1)(c) of Rule 404(c). A medical or other expert who is testifying pursuant to Rule 404(c) is not required to state a diagnostic conclusion concerning any aberrant sexual propensity of the defendant so long

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as his or her testimony assists the trier of fact and there is other evidence which satisfies the requirements of subsection (1)(B).

Subsection (1)(C) of the rule requires the court to make a Rule 403 analysis in all cases. The rule also requires the court in all cases to instruct the jury on the proper use of any other act evidence that is admitted. At a minimum, the court should instruct the jury that the admission of other acts does not lessen the prosecution's burden to prove the defendant's guilt beyond a reasonable doubt, and that the jury may not convict the defendant simply because it finds that he committed the other act or had a character trait that predisposed him to commit the crime charged.

### Comment to Original 1977 Rule

*State v. Superior Court*, 113 Ariz. 22, 545 P.2d 946 (1976), is consistent with and interpretative of Rule 404(a)(2).

### Paragraph (a)(1) — Character evidence generally — Character of the accused.

#### Criminal Cases

404.a.1.cr.010 The defendant in a criminal case is permitted to offer evidence of a trait of the defendant's character provided that trait of character is pertinent to the litigation.

*State v. Lopez*, 174 Ariz. 131, 139, 847 P.2d 1078, 1086 (1992) (defendant's character of being nonviolent individual who was caring when dealing with children was relevant to murder charge resulting from beating death of 1-year-old victim, thus trial court erred in not admitting that evidence; because state would then have had right to introduce evidence that defendant had been convicted of child molestation 1 month before trial, exclusion of evidence did not prejudice defendant).

*State v. Rhodes*, 219 Ariz. 476, 200 P.3d 973, ¶¶ 10–12 (Ct. App. 2008) (court held that, when defendant is charged with sexual conduct with child, evidence of defendant's sexual normalcy, or appropriateness in interacting with children, is character trait and one that pertains to charges of sexual conduct with child).

*State v. Vandever*, 211 Ariz. 206, 119 P.3d 473, ¶¶ 9–13 (Ct. App. 2005) (defendant made illegal left turn from right lane; oncoming car collided and passenger died; defendant proffered evidence that he acted prudently and carefully in conducting his life; trial court precluded that evidence; court held evidence of defendant's general reputation for prudence and care in daily life was not relevant and not "pertinent," thus trial court properly precluded this evidence).

404.a.1.cr.030 Once a defendant presents evidence of the defendant's character, the state is permitted to present evidence of prior acts to rebut that character evidence.

*State v. Lopez*, 174 Ariz. 131, 139, 847 P.2d 1078, 1086 (1992) (defendant's character of being nonviolent individual who was caring when dealing with children was relevant to murder charge resulting from beating death of 1-year-old victim, thus trial court erred in not admitting that evidence; because state would then have had right to introduce evidence that defendant had been convicted of child molestation 1 month before trial, exclusion of evidence did not prejudice defendant).

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### Paragraph (a)(2) — Character evidence generally — Character of the victim.

#### Criminal Cases

**404.a.2.cr.010** The defendant in a criminal case is permitted to offer evidence of a trait of the victim's character provided that trait of character is pertinent to the litigation.

*State v. Fish*, 222 Ariz. 109, 213 P.3d 258, ¶ 25 (Ct. App. 2009) (defendant killed victim, and claimed he acted in self-defense; defendant was permitted to offer evidence of victim's character for violence, but could do so only through evidence of opinion or reputation).

*State v. Connor*, 215 Ariz. 553, 161 P.3d 596, ¶¶ 18–25 (Ct. App. 2007) (defendant was charged with first-degree murder; defendant contended he was entitled to discovery of victim's medical records to support his claim of self-defense; defendant was able to present testimony that victim had character trait that caused him to become more easily agitated and aggressive when not on medication, and to present evidence that victim was not taking his medication; because defendant gave no indication that victim's medical records could have contained any additional information that would have been admissible, defendant failed to establish that he was entitled to disclosure of victim's medical records).

**404.a.2.cr.015** If the defendant offers evidence of a trait of the victim's character that is pertinent to the litigation, the state is then permitted to offer evidence to rebut that character evidence.

*State v. Greene*, 192 Ariz. 431, 967 P.2d 106, ¶¶ 9–11 (1998) (once defendant made claim that he killed victim in response to victim's homosexual advance, state was permitted to offer evidence of victim's heterosexual character; because accusing married person of making non-spousal sexual advance places other aspects of person's character in evidence, such as fidelity, integrity, honesty, trustworthiness, and loyalty, state properly obtained testimony from victim's widow that he was "a man of great honor and integrity, of great moral principle, of deep, abiding faith . . . [and] devoted to [his wife]").

**404.a.2.cr.030** Evidence of specific acts of violence by a victim are admissible only when the defendant personally observed those acts or when the defendant knew of those acts prior to the charged offense.

*State v. Taylor*, 169 Ariz. 121, 817 P.2d 488 (1991) (evidence of victim's prior conviction for child abuse was admissible because defendant knew of this conviction, and it was relevant to determine whether defendant was justifiably apprehensive about his own safety and safety of two children in apartment).

*State v. Santanna*, 153 Ariz. 147, 735 P.2d 757 (1987) (specific acts of violence by victim would be admissible if known to defendant in order to prove defendant's state of mind, but only if defendant's state of mind is relevant; because defendant did not rely on self-defense, and evidence did not show that victim was initial aggressor, violent character of victim was not relevant, thus evidence of victim's character was not admissible).

*State v. Fish*, 222 Ariz. 109, 213 P.3d 258, ¶¶ 25, 35–40 (Ct. App. 2009) (defendant killed victim, and claimed he acted in self-defense; because defendant did not know of victim's specific acts of violence at time confrontation occurred, defendant was not permitted to introduce evidence of those specific acts of violence).

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*State v. Connor*, 215 Ariz. 553, 161 P.3d 596, ¶¶ 12–16 (Ct. App. 2007) (defendant was charged with first-degree murder; defendant contended he was entitled to discover victim's medical records to support claim of self-defense; because defendant made no claim that medical records contained instances of violence about which defendant already knew, defendant would not be permitted to use any instances of violence contained in medical records, assuming there were any, thus defendant was not entitled to disclosure of victim's medical records).

*State v. Roscoe*, 182 Ariz. 332, 897 P.2d 634 (Ct. App. 1994) (because defendant had no prior knowledge of officers' alleged tendencies for aggressiveness or violence, trial court properly precluded any evidence of officers' specific acts of alleged aggressiveness or violence), *vacated on other grounds*, 185 Ariz. 68, 912 P.2d 1297 (1996).

*State v. Cano*, 154 Ariz. 447, 743 P.2d 956 (Ct. App. 1987) (because defendant made no showing he was personally aware of any specific acts of assaultive behavior by guard, he was not entitled to discovery of guard's records for purpose of learning whether they contained information showing that guard was predisposed to provoking altercations).

*State v. Williams*, 141 Ariz. 127, 685 P.2d 764 (Ct. App. 1984) (proper to exclude evidence of victim's violent character when defendant had no knowledge of victim's conduct).

*State v. Zamora*, 140 Ariz. 338, 681 P.2d 921 (Ct. App. 1984) (in prosecution for aggravated assault, proper to exclude testimony that victim belonged to gang called the "Eastsiders" when defendant did not know of this gang, did not know victim was member of such gang, and did not know gang to be violent).

### Paragraph (b) — Other crimes, wrongs, or acts.

#### Civil Cases

404.b.civ.050 If the conduct in committing the other crime, wrong, or act was a **necessary preliminary** to, or an **inevitable result** of, the conduct that is the subject of the litigation, evidence of the other act or acts will **complete the story** and will be **intrinsic evidence**, and thus admissible without a Rule 404(b) analysis.

*Hudgins v. Southwest Airlines, Co.*, 221 Ariz. 472, 212 P.3d 810, ¶ 22 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; jurors returned verdicts of \$500,000 each in compensatory damages and \$4 million each in punitive damages; SWA contended that evidence that plaintiffs (1) failed to obtain Maryland-issued concealed weapons permits and (2) failed to work with local bail agent in apprehending fugitive in Tucson after they were released from custody was relevant on issue of plaintiffs' comparative fault for failing to investigate adequately how to transport weapons legally on airplane; court held that neither (1) whether plaintiffs violated Maryland law while going to Baltimore airport nor (2) whether plaintiffs failed to comply with local laws while apprehending fugitive in Tucson made it more or less probable that plaintiffs exercised reasonable care in investigating how to travel legally on airplane with weapons, thus evidence was not relevant, and conduct in Maryland was not "necessary preliminary" to crimes charged for transporting weapons on airplane, thus this was not intrinsic evidence).

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**404.b.civ.060** If the conduct in committing the other crime, wrong, or act is so connected with the conduct that is the subject of the litigation that proof of one **incidentally involves** proof of another or **explains the circumstances** of the conduct that is the subject of the litigation, evidence of the other act or acts will **complete the story** and will be **intrinsic** evidence, and thus admissible without a Rule 404(b)

*Hudgins v. Southwest Airlines, Co.*, 221 Ariz. 472, 212 P.3d 810, ¶ 23 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; jurors returned verdicts of \$500,000 each in compensatory damages and \$4 million each in punitive damages; SWA contended that evidence that plaintiffs (1) failed to obtain Maryland-issued concealed weapons permits and (2) failed to work with local bail agent in apprehending fugitive in Tucson after they were released from custody was relevant on issue of plaintiffs' comparative fault for failing to investigate adequately how to transport weapons legally on airplane; court held that neither (1) whether plaintiffs violated Maryland law while going to Baltimore airport nor (2) whether plaintiffs failed to comply with local laws while apprehending fugitive in Tucson made it more or less probable that plaintiffs exercised reasonable care in investigating how to travel legally on airplane with weapons, thus evidence was not relevant; and that conduct that was the subject of litigation was manner that plaintiffs were able to fly with weapons, plaintiffs' arrest, incarceration, and eventual prosecution, and SWA's role in post-arrest investigation, and that plaintiffs' purported violations of other laws did not explain these events, thus this other act evidence did complete the story, so it was not intrinsic evidence).

**404.b.civ.080** If the evidence of other crimes, wrongs, or acts is **extrinsic** evidence, four factors protect a party from unfair prejudice that could result from the admission of this evidence: (1) the evidence must be admitted for a proper purpose, that is, it must be legally or logically relevant; (2) the evidence must be factually or conditionally relevant; (3) the trial court, if requested, may exclude this evidence if its probative value is substantially outweighed by the danger of unfair prejudice; and (4) the trial court, if requested, must give a limiting instruction on the limited purpose for which this evidence was admitted.

*Lee v. Hodge*, 180 Ariz. 97, 100-01, 882 P.2d 408, 411-12 (1994) (court employed four-part test as used in *State v. Atwood*, 171 Ariz. 576, 638, 832 P.2d 593, 655 (1992)).

**404.b.civ.090** Extrinsic evidence of another crime, wrong, or act is admissible if it is legally or logically relevant, which means it tends to prove or disprove any issue in the case, and thus is admitted for some purpose other than to show a person's criminal character.

\* *Cal X-tra v. W.V.S.V. Holdings*, 229 Ariz. 377, 276 P.3d 11, ¶ 90 (Ct. App. 2012) (evidence of defendant Wolfswinkel's criminal convictions and civil judgments was relevant to show why plaintiffs did not want to deal with Wolfswinkel, why they instructed other defendant not to deal with Wolfswinkel, and why they claimed other defendant breached fiduciary duty in dealing with Wolfswinkel).

*Higgins v. Assmann Elec. Inc.*, 217 Ariz. 289, 173 P.3d 453, ¶¶ 35-38 (Ct. App. 2007) (Assmann Electronics was German company; Meyer was Assmann's highest ranking officer in United States and was plaintiff's supervisor; Meyer and plaintiff had consensual sexual relationship that

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had terminated prior to time of relevant events; over Labor Day, Meyer called plaintiff, and getting no response, went to her apartment, and upon entering, found plaintiff and male companion dressed only in bath towels; Meyer became enraged and attacked plaintiff's companion; Meyer assaulted plaintiff, threw her out front door where her towel came off when she hit wall, punched plaintiff, and then told her she was fired; 3½ weeks later, Assmann's chief financial officer sent letter to plaintiff stating her employment was terminated and her work visa had therefore expired; parties went to trial on assault claim against Meyer and wrongful termination claim against Meyer and Assmann; jurors returned verdict in favor of plaintiff on both counts; Meyer contended trial court erred in admitting evidence of prior altercation he had with co-workers at Z-Tejas restaurant; court noted there was evidence that people at Assmann were aware of Meyer's conduct and took no action; court held this evidence had some probative value in showing Meyer was fully in charge in Arizona and that people at Assmann did not challenge his conduct or decisions).

*Brown v. U.S.F. & G.*, 194 Ariz. 85, 977 P.2d 807, ¶¶ 15–18 (Ct. App. 1998) (defended insurance company refusal to pay claim on basis that plaintiff had breached contract by misrepresenting material facts on insurance application; because plaintiff's "long history of fire loss claims" was admissible to show that plaintiff had misrepresented fire loss history on insurance application, it was admissible even though it also tended to show plaintiff's character).

*Thompson v. Better-Bilt Alu. Prod. Co.*, 187 Ariz. 121, 927 P.2d 781 (Ct. App. 1996) (after-acquired evidence that plaintiff committed fraud in the employment application admissible on issue of extent of plaintiff's damages for wrongful termination).

404.b.civ.100 If the **extrinsic** evidence of the other crime, wrong, or act is not relevant to any issue being litigated, then the only effect of that evidence is to show that the person has a bad character, and thus it would be error to admit the evidence.

- \* *Cal X-tra v. W.V.S.V. Holdings*, 229 Ariz. 377, 276 P.3d 11, ¶¶ 91–92 (Ct. App. 2012) (although evidence of defendant Wolfswinkel's criminal convictions and civil judgments was relevant to show why plaintiffs did not want to deal with Wolfswinkel, why they instructed other defendant not to deal with Wolfswinkel, and why they claimed other defendant breached fiduciary duty in dealing with Wolfswinkel, presentation of evidence caused trial to be more about Wolfswinkel's past and alleged proclivity for corruption, and closing argument was more about punishing Wolfswinkel for his past acts, thus trial court did not abuse its discretion in granting new trial).

*Hudgins v. Southwest Airlines, Co.*, 221 Ariz. 472, 212 P.3d 810, ¶ 21 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; jurors returned verdicts of \$500,000 each in compensatory damages and \$4 million each in punitive damages; SWA contended that evidence that plaintiffs (1) failed to obtain Maryland-issued concealed weapons permits and (2) failed to work with local bail agent in apprehending fugitive in Tucson after they were released from custody was relevant on issue of plaintiffs' comparative fault for failing to investigate adequately how to transport weapons legally on airplane; court held that neither (1) whether plaintiffs violated Maryland law while going to Baltimore airport nor (2) whether plaintiffs

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failed to comply with local laws while apprehending fugitive in Tucson made it more or less probable that plaintiffs exercised reasonable care in investigating how to travel legally on airplane with weapons, thus evidence was not relevant, and only purpose would be to show character to prove actions in conformity with character during event in question, which Rule 404(b) specifically excludes).

*Elia v. Pifer*, 194 Ariz. 74, 977 P.2d 796, ¶¶ 13–23 (Ct. App. 1998) (defendant was plaintiff's former attorney in dissolution action; plaintiff sued defendant for legal malpractice, claiming defendant did not have authority to agree to terms of proposed settlement agreement, and planned to introduce telephone message slip found in defendant's files purportedly saying not to agree to terms; in deposition testimony, defendant said she did not believe message slip was written in her office, and that plaintiff had come into her office and "rampaged" through his file; prior to trial, attorneys agreed message slip was admissible; in opening statement, plaintiff's attorney predicted that defendant would testify that plaintiff somehow planted message slip in file; defendant's attorney then claimed that statement opened door to defendant's state of mind and thus he intended to introduce evidence that Dental Board had found plaintiff had fraudulently altered patient's records; trial court allowed defendant's attorney to say that in opening statement, and allowed defendant to testify she thought defendant had planted the message slip because Dental Board had found plaintiff "guilty" of altering records; court held relevance and authenticity of message slip were not at issue at start of case because parties had stipulated to its admissibility, but when plaintiff suggested in opening statement that defendant might accuse plaintiff of fabrication, that made authenticity of message slip relevant, but it did not open door and make defendant's state of mind relevant, thus trial court erred in allowing admission of character evidence about plaintiff, resulting in reversal).

**404.b.civ.120** Evidence of other similar accidents at or near the place is admissible provided the conditions under which the previous accident were the same or substantially similar to the one in question, and there must be evidence tending to prove the existence of a dangerous or defective condition, knowledge of or notice of the dangerous condition, or negligence in permitting it to continue.

*Wiggs v. City of Phx.*, 197 Ariz. 358, 4 P.3d 413, ¶¶ 47–52 (Ct. App. 1999) (plaintiff's daughter killed while in crosswalk at 8:05 p.m. August 3; testimony was that streetlight was not on; plaintiff offered evidence of two prior accidents in March 1 and May 6; because there was no testimony indicating whether streetlight was on during these prior accidents, trial court did not abuse discretion in excluding that evidence), *vac'd*, 198 Ariz. 367, 10 P.3d 625 (2000).

**404.b.civ.240** Extrinsic evidence of another crime, wrong, or act is relevant to show knowledge.

*Hudgins v. Southwest Airlines, Co.*, 221 Ariz. 472, 212 P.3d 810, ¶¶ 11–14 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; jurors returned verdicts of \$500,000 each in compensatory damages and \$4 million each in punitive damages; SWA contended trial court erred in admitting letter from FAA to SWA concerning 1998 incident in which SWA permitted other bounty hunters who had presented false information to board

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SWA flight; letter stated SWA failed to ask basic questions that would have prevented deception, and further advised SWA that there appeared to be prevalent problem in Arizona where individuals calling themselves bail recovery agents or bounty hunters have been able to present themselves as being authorized to travel armed when they were not so authorized; court held letter was admissible to show SWA had notice of problem of bounty hunters attempting to fly while armed and what steps SWA should take to prevent this from happening).

*Higgins v. Assmann Elec. Inc.*, 217 Ariz. 289, 173 P.3d 453, ¶¶ 35–38 (Ct. App. 2007) (Assmann Electronics was German company; Meyer was Assmann's highest ranking officer in United States and was plaintiff's supervisor; Meyer and plaintiff had consensual sexual relationship that had terminated prior to time of relevant events; over Labor Day, Meyer called plaintiff, and getting no response, went to her apartment, and upon entering, found plaintiff and male companion dressed only in bath towels; Meyer became enraged and attacked plaintiff's companion; Meyer assaulted plaintiff, threw her out front door where her towel came off when she hit wall, punched plaintiff, and then told her she was fired; 3½ weeks later, Assmann's chief financial officer sent letter to plaintiff stating her employment was terminated and her work visa had therefore expired; parties went to trial on assault claim against Meyer and wrongful termination claim against Meyer and Assmann; jurors returned verdict in favor of plaintiff on both counts; Meyer contended trial court erred in admitting evidence of prior altercation he had with co-workers at Z-Tejas restaurant; court noted there was evidence that people at Assmann were aware of Meyer's conduct and took no action; court held this evidence had some probative value in showing that people at Assmann knew of Meyer's conduct and did not challenge his conduct or decisions).

**404.b.civ.250** Extrinsic evidence of another crime, wrong, or act is relevant to show **motive**.

*State v. Martinez*, 196 Ariz. 451, 999 P.2d 795, ¶¶ 29–33 (2000) (evidence of arrest warrant and defendant's knowledge of warrant was admissible to show motive for killing).

**404.b.civ.305** Extrinsic evidence of another crime, wrong, or act may be relevant to determine **amount of damages**.

*Wiggs v. City of Phx.*, 197 Ariz. 358, 4 P.3d 413, ¶¶ 53–58 (Ct. App. 1999) (plaintiff's daughter was struck and killed while in crosswalk; evidence that plaintiff gave birth to another daughter admissible to show grief might be less, and evidence that plaintiff's boyfriend died of AIDS admissible to show plaintiff's grief may have come in part from another source), *vac'd*, 198 Ariz. 367, 10 P.3d 625 (2000).

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### Criminal Cases

NOTE: In 2012, Arizona Supreme Court adopted a more narrow definition of “extrinsic evidence” as follows: Evidence of an “other act” is **intrinsic** only if it (1) directly proves the charged offense, or (2) the other act is performed contemporaneously with and directly facilitates the commission of the charged offense. *State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509, ¶ 20 (2012). Previously, in 1996 the Arizona Supreme Court had defined “extrinsic evidence” as follows: Evidence is **intrinsic** when (1) evidenced of the other act and evidenced of the crime charged are “inextricably intertwined,” or (2) both acts are part of a “single criminal episode,” or (3) the other acts were “necessary preliminaries” to the crime charged. *State v. Dickens*, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996), accord, *State v. Baldenegro*, 188 Ariz. 10, 15–16, 932 P.2d 275, 280–81 (Ct. App. 1996). In its 2012 decision in *Ferrero*, the Arizona Supreme Court specifically rejected the *Dickens* test as too broad and replaced it with that more narrow definition. Thus, for cases previously decided between 1996 and 2012, the evidence found to be extrinsic evidence may or may not qualify as intrinsic evidence under this new test. **This text has retained those older cases and the numbered paragraphs for reference and analytical purposes, but the practitioner should not cite those cases as authority to support a claim that certain evidence is intrinsic evidence.**

404.b.cr.010 Evidence of an “other act” is **intrinsic** only if (1) the evidence directly proves the charged offense, or (2) the evidence shows the other act is performed contemporaneously with and directly facilitates the commission of the charged offense.

- \* *State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509, ¶ 20 (2012) (court replaced the test adopted in 1996 and replaced it with this test).
- \* *State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509, ¶¶ 25–28 (2012) (defendant was charged with sexual conduct with minor; trial court admitted evidence that, on ride to defendant’s house on night of first charged offense, defendant told victim to pull down his pants and underwear and expose himself, and threatened to leave victim on side of road if he did not comply; evidence further showed defendant and victim arrived at defendant’s house, victim talked to defendant’s mother and played computer games for at least 30 minutes while defendant showered, victim then joined defendant in bed, at which time defendant completed first charged act; court held evidence of exposure in car did not meet narrow definition of intrinsic evidence because two acts were qualitatively different and constituted two separate instances of sexual abuse, and further held, because trial court allowed evidence of exposure in car to be offered to prove defendant’s propensity to commit charged act, trial court erred in admitting that evidence without screening it under Rule 404(c)).
- \* *State v. Butler*, 230 Ariz. 465, 286 P.3d 1074, ¶¶ 26–32 (Ct. App. 2012) (defendant was charged with conspiracy to possess or transport marijuana for sale; defendant objected to admission of property receipt from Georgia sheriff’s department for “Nike shoe box containing a large amount of U.S. currency”; because receipt was dated less than 1 week before Arizona authorities found drugs and weapons, and cash in box in house where defendant was visiting, trial court reasonably concluded receipt directly proved alleged conspiracy or that transporting large amounts of cash was done contemporaneously with and directly facilitated charged conspiracy; additionally, receipt showed defendant had Florida address, and evidence for current charges showed large amounts of marijuana were shipped to Florida; evidence was thus intrinsic).

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**404.b.cr.020** If the other act is **intrinsic** and thus evidence of this other act is **intrinsic evidence**, this other act is not a separate crime, wrong, or act, thus **intrinsic evidence** is admissible without going through a Rule 404(b) or Rule 404(c) analysis.

- \* *State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509, ¶¶ 11, 22 (2012) (court stated evidence of intrinsic acts, including evidence of similar sex act committed with same child that is intrinsic, is not subject to Rule 404(c) screening).

**404.b.cr.030** If the other act is **intrinsic** and thus evidence of this other act is **intrinsic evidence** and thus admissible without going through a Rule 404(b) or Rule 404(c) analysis, it may additionally be admissible for other relevant purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, or to show the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.

- \* *State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509, ¶ 12 (2012) (court stated evidence of defendant's other sexual acts with same victim might also be admissible under Rule 404(b) or Rule 404(c)).

**404.b.cr.040** If the other act is not **intrinsic** and thus evidence of this other act is not **intrinsic evidence**, the evidence may still be admissible under Rule 404(b) for other relevant purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, or admissible under Rule 404(c) to show the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.

- \* *State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509, ¶¶ 12, 23–24 (2012) (court stated evidence of defendant's other sexual acts with same victim might be admissible under Rule 404(b) or Rule 404(c)).

## ARIZONA EVIDENCE REPORTER

### Cases decided under the 1996 test for intrinsic evidence that no longer applies:

404.b.cr.010 Rule 404(b) governs only other act evidence that is “extrinsic,” and thus does not apply to other act evidence that is “intrinsic”; other act evidence is intrinsic when (1) the other act or acts and the conduct that is the subject of the crime charged are inextricably intertwined, or (2) all acts are part of a single criminal episode, or (3) the other act or acts are necessary preliminaries to the crime charged.

*State v. Andriano*, 215 Ariz. 497, 161 P.3d 540, ¶¶ 17–23 (2007) (defendant was charged with first-degree murder of her husband; trial court admitted as intrinsic evidence testimony that defendant attempted to purchase insurance on husband’s life; court held that, because defendant was not able to buy that insurance, attempts to buy insurance were not inextricably intertwined with husband’s murder, were not part of single criminal episode, and were not necessary preliminaries to murder, thus this was not intrinsic evidence; court held, however, this extrinsic evidence was admissible as other act evidence under Rule 404(b)).

*State v. Andriano*, 215 Ariz. 497, 161 P.3d 540, ¶¶ 24–27 (2007) (defendant charged with first-degree murder of husband; trial court admitted as intrinsic evidence testimony that defendant had extramarital sex with other men; court held that extramarital sex was not inextricably intertwined with husband’s murder, was not part of single criminal episode, and was not necessary preliminary to murder, thus this was not intrinsic evidence; court held, however, this extrinsic evidence was admissible as other act evidence under Rule 404(b)).

*State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717, ¶ 56 (2001) (because defendant’s discussion with third person about committing robbery took place 2 years before crime in question and third person was not one with whom defendant committed crime in question, and because robbery was to take place at time of day and week different from crime in question, this other act evidence was not intrinsic).

*State v. Greene*, 192 Ariz. 431, 967 P.2d 106, ¶¶ 20–23 (1998) (because letters were about offense in question, they were not evidence of another crime, wrong, or act; and even if they were, they were admissible to show consciousness of guilt and to rebut claim of remorse).

*State v. Dickens*, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996) (defendant claimed trial court should not have admitted evidence he had stolen murder weapon from co-worker; court analyzed issue under Rule 404(b) because both trial court and parties did so; court stated evidence was admissible absent Rule 404(b) analysis because it was intrinsic evidence).

*State v. Coghill*, 216 Ariz. 578, 169 P.3d 942, ¶¶ 25–26 (Ct. App. 2007) (defendant was charged with sexual exploitation of minor based on child pornography on his computer; defendant contended trial court abused discretion in admitting evidence that he had downloaded adult pornography on his computer; court held (1) evidence of adult pornography was not inextricably intertwined with evidence of child pornography, (2) possessing adult pornography and possessing child pornography were not part of a single criminal episode, and (3) possessing adult pornography was not necessary preliminary to possessing child pornography, thus evidence of possessing adult pornography was not intrinsic evidence).

*State v. Baldenegro*, 188 Ariz. 10, 15–16, 932 P.2d 275, 280–81 (Ct. App. 1996) (defendant charged with participating in criminal syndicate for benefit of street gang claimed trial court erred in admitting evidence of gang activity by other members of street gang; court held this was intrinsic evidence because it was inextricably intertwined with charged offense).

## RELEVANCY AND ITS LIMITS

### Cases decided under the 1996 test for intrinsic evidence that no longer applies:

404.b.cr.015 The phrase **common scheme or plan** as used in both Rule 404(b) and Rule 13.3(a)(3) of the Arizona Rules of Criminal Procedure should be read in a similar fashion, and that phrase is defined in such a way that, in order for the various acts to be part of a **common scheme or plan**, the acts must either be sufficiently related to be considered a single criminal offense, or must be parts of particular plan (overarching plan) of which charged crime is part; under this definition, it appears that another crime, wrong, or act that is part of a common scheme or plan would be either a necessary preliminary to the crime charged or part of a single criminal episode, and thus would be considered **intrinsic** evidence and therefore admissible without a Rule 404(b) analysis.

*State v. Lee(I)*, 189 Ariz. 590, 598–99, 944 P.2d 1204, 1212–13 (1997) (both victims were killed during robberies; although (1) murders were 9 days apart; (2) both victims were (a) killed with .22 caliber weapon, (b) shot in head, (c) found in same area, (d) required to carry cash, (e) called to scene, and (f) worked out of automobiles, which were vandalized; (3) similar shoe prints were found at both crime scenes; and (4) defendant admitted firing gun in both murders, there was no testimony or evidence suggesting two robberies were part of single plan, thus crimes charged for two victims were not part of a common scheme or plan).

*State v. Hughes*, 189 Ariz. 62, 68–69, 938 P.2d 457, 463–64 (1997) (because fire bombings were merely similar and not shown to be part of a particular plan (overarching criminal scheme), trial court erred in admitting other act evidence).

*State v. Ives*, 187 Ariz. 102, 106–08, 927 P.2d 762, 766–68 (1996) (court stated that phrase “common scheme or plan” as used in both Rule 404(b) and Rule 13.3(a)(3) of the Arizona Rules of Criminal Procedure should be read in a similar fashion, and rejected those cases requiring only “visual connection” for there to be a common scheme or plan).

*State v. Ives*, 187 Ariz. 102, 106–09, 927 P.2d 762, 766–69 (1996) (court stated phrase “common scheme or plan” as used in both Rule 404(b) and Rule 13.3(a)(3), Ariz. R. Crim. P., should be read in similar fashion and noted comment to Rule 13.3(a)(3) indicated component acts of common scheme or plan must be sufficiently related to be considered single criminal offense; court adopted narrower definition of phrase “common scheme or plan” and held other act is part of common scheme or plan only if part of particular plan (overarching plan) of which charged crime is part; court concluded other child molestations were merely similar conduct and not part of particular plan, thus trial court erred in joining counts).

*State v. Dickens*, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996) (held other act evidence is intrinsic when evidence of other act and evidence of crime charged are inextricably intertwined, both acts are part of single criminal episode, or other act is necessary preliminary to crime charged; evidence that defendant had stolen murder weapon from co-worker was admissible absent Rule 404(b) analysis because it was intrinsic evidence).

*State v. Derello*, 199 Ariz. 435, 18 P.3d 1234, ¶¶ 9–16 (Ct. App. 2001) (defendant robbed convenience store, shot clerk, and sought to evade pursuing officers; defendant was convicted of attempted murder, robbery, unlawful flight, and prohibited possession charges; when defendant was subsequently convicted of other offenses, state alleged unlawful flight and prohibited possession as prior offenses; court concluded these offenses occurred on same occasion, thus they could be counted only as one prior offense for enhancement purposes; it therefore appears this evidence would be considered intrinsic evidence).

**Cases decided under the 1996 test for intrinsic evidence that no longer applies:**

*State v. Vigil*, 195 Ariz. 189, 986 P.2d 222, ¶¶ 23-25 (Ct. App. 1999) (no showing defendant had plan to injure victim, thus defendant's prior and subsequent acts of throwing objects at victim's house and charged act of firing gun at victim were not part of common scheme or plan).

*State v. Garland*, 191 Ariz. 213, 953 P.2d 1266, ¶ 16 (Ct. App. 1998) (although two robberies occurred on same night in same general area and were committed by black man named "Mike" wearing cap with "CR" logo and with gun tucked in front of pants, court noted trial court did not find overarching criminal plan to steal items of value and buy drugs, thus trial court should not have joined counts).

404.b.cr.020 If the conduct in committing the other crime, wrong, or act is an **element of the crime charged**, either (1) the conduct in committing the other act or acts and the conduct in committing the crime charged will be inextricably intertwined, or (2) all acts will be part of a single criminal episode, or (3) the other acts will be necessary preliminaries to the crime charged, thus evidence of the other act or acts will be **intrinsic evidence** and admissible without a Rule 404(b) analysis.

*State ex rel. Romley v. Galati (Petersen)*, 195 Ariz. 9, 985 P.2d 494, ¶¶ 2-5, 10, 15 (1999) (because committing DUI on suspended or invalid license is element of offense of aggravated DUI, defendant not entitled to bifurcated trial on issue of suspended or invalid license).

*State v. Talamante (Murray)*, 214 Ariz. 106, 149 P.3d 484, ¶¶ 6-12 (Ct. App. 2006) (grand jury indicted defendant for violent sexual assault; state alleged defendant had prior conviction for sexual assault; court held that fact of prior conviction was element of offense and rejected defendant's contention that fact of prior conviction was sentencing enhancement factor, and thus concluded trial court erred in ruling that state could not introduce evidence of prior conviction in its case-in-chief).

*State v. Lopez*, 209 Ariz. 58, 97 P.3d 883, ¶¶ 4-8 (Ct. App. 2004) (defendant charged with misconduct involving weapons for possession of firearm by prohibited possessor, which is person who has been convicted of felony and whose civil right to carry a gun or firearm has not been restored; defendant offered to stipulate to fact he was prohibited possessor to prevent state from presenting to jurors evidence of his prior conviction and evidence his right to possess firearm had not been restored; state rejected offer and trial court refused to force state to accept stipulation; court held that, because prior conviction and non-restoration of civil right were elements of offense, defendant had no right to preclude jurors from receiving evidence of those matters).

*State v. Newnom*, 208 Ariz. 507, 95 P.3d 950, ¶¶ 2-5 (Ct. App. 2004) (defendant charged with aggravated domestic violence; defendant offered to stipulate to prior convictions to avoid having jurors receive that information; state rejected offer and trial court refused to force state to accept stipulation; court held prior convictions are elements of aggravated domestic violence under A.R.S. § 13-3601.02, thus defendant was not entitled to bifurcated trial on issue of prior convictions and had no right to preclude jurors from receiving evidence of prior convictions).

## RELEVANCY AND ITS LIMITS

### Cases decided under the 1996 test for intrinsic evidence that no longer applies:

**404.b.cr.030** If the conduct in committing the other crime, wrong, or act is **inextricably intertwined** with the conduct in committing the crime charged, the evidence of the other act or acts will be **intrinsic** evidence and thus admissible without a Rule 404(b) analysis.

*State v. Prion*, 203 Ariz. 157, 52 P.3d 189, ¶¶ 31–36 (2002) (court noted offenses may be joined under Rule 13.3(a)(2) of Arizona Rules of Criminal Procedure if they are based on the same conduct or are otherwise connected in their commission; court held Rule 13.3(a)(2) should be interpreted narrowly; court held that killing of 19-year-old college student and kidnapping and assault of 35-year-old street prostitute were not provable by same evidence and did not arise out of series of connected acts, thus trial court erred in not severing counts involving two different victims).

*State v. Dickens*, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996) (held other act evidence is intrinsic when evidence of other act and evidence of crime charged are inextricably intertwined, both acts are part of single criminal episode, or other act is necessary preliminary to crime charged; evidence that defendant had stolen murder weapon from co-worker was admissible absent Rule 404(b) analysis because it was intrinsic evidence).

*State v. Derello*, 199 Ariz. 435, 18 P.3d 1234, ¶¶ 9–16 (Ct. App. 2001) (on prior occasion, defendant robbed convenience store, shot clerk, and sought to evade pursuing officers; defendant convicted of attempted murder, robbery, unlawful flight, and prohibited possession charges; when defendant was later convicted of other offenses, state alleged unlawful flight and prohibited possession as prior offenses; court concluded these offenses occurred on same occasion because they were closely related both by time and distance, and were directed to the accomplishment of a single criminal objective, thus they could be counted only as one prior offense for enhancement purposes; it therefore appears this evidence would be considered intrinsic evidence).

*State v. Marshall*, 197 Ariz. 496, 4 P.3d 1039, ¶¶ 8–13 (Ct. App. 2000) (defendant was charged with performing oral sex on 9-year-old victim; during victim's testimony about that act, she also said defendant penetrated her vagina with his fingers and penis on that occasion; court held evidence of vaginal penetration was intrinsic to charge of oral sex, thus that evidence would have been admissible absent Rule 404(b) analysis).

*State v. Garland*, 191 Ariz. 213, 953 P.2d 1266, ¶¶ 14–15 (Ct. App. 1998) (although robberies occurred on same night in same general area and were committed by black man named "Mike" wearing cap with "CR" logo and with gun tucked in front of pants, court held crimes and elements of proof were independent of each other, thus trial court should not have joined counts).

*State v. Baldenegro*, 188 Ariz. 10, 15–16, 932 P.2d 275, 280–81 (Ct. App. 1996) (defendant was charged with participating in criminal syndicate for benefit of criminal street gang and claimed trial court erred in admitting evidence of gang activity by other members of street gang in question; court held that this was intrinsic evidence because it was inextricably intertwined with charged offense).

**Cases decided under the 1996 test for intrinsic evidence that no longer applies:**

**404.b.cr.040** If the conduct in committing the other crime, wrong, or act and the conduct in committing the crime charged are all **part of a single criminal episode**, the evidence of the other act or acts will be **intrinsic evidence** and thus admissible without a Rule 404(b) analysis.

*State v. Garland*, 191 Ariz. 213, 953 P.2d 1266, ¶¶ 14–15 (Ct. App. 1998) (although robberies occurred on same night in same general area and were committed by black man named “Mike” wearing cap with “CR” logo and with gun tucked in front of pants, court held crimes and elements of proof were independent of each other, thus trial court should not have joined counts).

**404.b.cr.050** If the conduct in committing the other crime, wrong, or act was a **necessary preliminary** to, or an **inevitable result** of, the crime charged, evidence of the other act or acts will **complete the story** and will be **intrinsic evidence**, and thus admissible without a Rule 404(b) analysis.

*State v. Dickens*, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996) (held that other act evidence is intrinsic when evidence of other act and evidence of crime charged are inextricably intertwined, both acts are part of single criminal episode, or other act is necessary preliminary to crime charged; evidence that defendant had stolen murder weapon from co-worker was admissible absent Rule 404(b) analysis because it was intrinsic evidence).

**404.b.cr.060** If the conduct in committing the other crime, wrong, or act is so connected with the crime charged that proof of one **incidentally involves** proof of another or **explains the circumstances** of the crime charged, evidence of the other act or acts will **complete the story** and will be **intrinsic evidence**, and thus admissible without a Rule 404(b) analysis.

*State v. Johnson*, 116 Ariz. 399, 400, 569 P.2d 829, 830 (1977) (defendant was charged with receiving earnings of prostitute; witness testified that she worked as prostitute and turned over to defendant her earnings as prostitute; because evidence that, 1 month before defendant was arrested on instant charges, he pulled witness from truck, spat in her face, forced her into her own car, and beat her did not incidentally involve proof crime charged or explain circumstances of crime charged, evidence of other acts did not complete story of crime charged).

**404.b.cr.070** Evidence that the defendant has committed similar **sexual acts against the same victim** may indicate that the other acts were part of a system, plan, or scheme and therefore **intrinsic evidence**, thus there will be no need to conduct a Rule 404(b) analysis.

*State v. Garcia*, 200 Ariz. 471, 28 P.3d 327, ¶ 33 (Ct. App. 2001) (opinion stated “our courts have never held that discrete offenses, identical to but occurring at different times than the one charged, are intrinsic”; court was apparently unaware of *State v. Marshall*, 197 Ariz. 496, 4 P.3d 1039 (Ct. App. 2000), and *State v. Jones*, 188 Ariz. 534, 937 P.2d 1182 (Ct. App. 1996)).

*State v. Marshall*, 197 Ariz. 496, 4 P.3d 1039, ¶¶ 2–7 (Ct. App. 2000) (trial court denied defendant’s motion to sever two counts alleging sexual conduct with minor in March 1995 with 16 counts alleging sexual conduct with same minor over 4-day period in October 1996; court concluded evidence of 16 counts would have been admissible at separate trial on other two counts, thus trial court did not err in denying motion to sever).

## RELEVANCY AND ITS LIMITS

### Cases decided under the 1996 test for intrinsic evidence that no longer applies:

*State v. Marshall*, 197 Ariz. 496, 4 P.3d 1039, ¶¶ 8–13 (Ct. App. 2000) (defendant was charged with performing oral sex on 9-year-old victim; during victim's testimony about that act, she also said defendant penetrated her vagina with his fingers and penis on that occasion; court held evidence of vaginal penetration was intrinsic to charge of oral sex, thus that evidence would have been admissible absent Rule 404(b) analysis).

*State v. Alatorre*, 191 Ariz. 208, 953 P.2d 1261, ¶ 16 (Ct. App. 1998) (defendant's statement that he rubbed his penis against 8-year-old victim's vagina admissible to show defendant's lewd disposition or unnatural attitude toward the particular victim).

*State v. Jones*, 188 Ariz. 534, 937 P.2d 1182 (Ct. App. 1996) (state charged defendant with eight counts of sexual assault against victim when she was 14 years old; at trial, state asked trial court to be allowed to introduce evidence that defendant had been sexually assaulting victim over 9 year period prior to charged offenses; trial court admitted evidence to complete story, show absence of mistake or accident, and to show motive or opportunity; court noted Arizona Supreme Court had held evidence of prior similar sexual offenses by defendant against same victim was admissible to show defendant's lewd disposition toward that particular victim, thus trial court did not need to rely on Rule 404(b) for admission of that evidence), *rev. denied as improv. granted*, 191 Ariz. 522, 958 P.2d 1120 (1998).

**404.b.cr.075** If the defendant has committed other acts, including acts of violence against the same victim for a particular purpose, the other acts may be part of a system, plan, or scheme, and therefore intrinsic evidence, and, if so, there is no need to conduct a Rule 404(b) analysis.

*State v. Hughes*, 189 Ariz. 62, 938 P.2d 457 (1997) (evidence of defendant's drug involvement with victim relevant to motive, but trial court erred in admitting cumulative evidence because it went far beyond that necessary to establish motive).

*State v. Mills*, 196 Ariz. 269, 995 P.2d 705, ¶¶ 23–26 (Ct. App. 1999) (defendant and wife were seeking dissolution; defendant was charged with killing wife by paying someone to shoot her; because this was evidence of violent acts against same victim, trial court properly admitted evidence that, 2 months prior to shooting, defendant had cut brake lines on wife's truck).

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**404.b.cr.080** If the evidence of other crimes, wrongs, or acts is **extrinsic** evidence, four factors protect a party from unfair prejudice that could result from the admission of this evidence: (1) the evidence must be admitted for a proper purpose, that is, it must be legally or logically relevant; (2) the evidence must be factually or conditionally relevant; (3) the trial court, if requested, may exclude this evidence if its probative value is substantially outweighed by the danger of unfair prejudice; and (4) the trial court, if requested, must give a limiting instruction on the limited purpose for which this evidence was admitted.

*Huddleston v. United States*, 485 U.S. 681, 685-92, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988) (defendant was charged with possessing and selling stolen goods (Memorex videocassette); in order to prove defendant knew video cassettes were stolen, government introduced evidence that defendant had previously sold stolen television sets and had previously sold stolen appliances; Court rejected defendant's contention that, before admitting other act evidence, trial court must make preliminary finding that other act happened and that defendant committed that other act, and held instead that trial court should admit such evidence if it concludes there is sufficient evidence from which jurors could conclude that other act happened and that defendant committed that other act).

*State v. Gulbrandson*, 184 Ariz. 46, 60, 906 P.2d 579, 593 (1995) (court adopted reasoning of *Huddleston v. United States*).

*State v. Atwood*, 171 Ariz. 576, 638, 832 P.2d 593, 655 (1992) (court adopted reasoning of *Huddleston v. United States*).

**404.b.cr.090** **Extrinsic** evidence of another crime, wrong, or act is admissible if it is legally or logically relevant, which means it tends to prove or disprove any issue in the case, and thus is admitted for some purpose other than to show the defendant's criminal character.

- \* *State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509, ¶¶ 12-13 (2012) (court stated evidence of defendant's other sexual acts with same victim might be admissible under Rule 404(b) or Rule 404(c)).

*State v. Lee*, 191 Ariz. 542, 959 P.2d 799, ¶ 11 (1998) (drug courier profile evidence may be properly admitted at suppression hearing to determine whether reasonable suspicion existed for stop).

- \* *State v. Gonzalez*, 229 Ariz. 550, 278 P.3d 328, ¶¶ 8-16 (Ct. App. 2012) (officer stopped vehicle driven by A-P; defendant was passenger; officer ultimately removed windshield of vehicle and found methamphetamine worth \$112,500 hidden in area under windshield; defendant denied knowing drugs were in vehicle; trial court admitted testimony that drug-trafficking organizations have profit motive and do not typically entrust large amounts of drugs to "unknowing transporter" because they need to know person can be trusted and drugs are going to get to destination; court held this evidence was not admitted as drug courier profile evidence, but was instead properly admitted to counter defendant's contention he did not know drugs were in vehicle).

*State v. Smyers*, 205 Ariz. 479, 73 P.3d 610, ¶¶ 6-8 (Ct. App. 2003) (defendant was charged with furnishing harmful items to 11-year-old minor as result of showing her pictures on computer screen of man and woman engaged in sexual intercourse; trial court ruled state could admit evidence that defendant had kissed victim on lips, tried to "French kiss" her by sticking his tongue in her mouth, and hugging her by placing his hands on her "butt" and pulling her

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against his body; court held trial court did not abuse discretion in finding this other act evidence relevant and admitting it, but did not state theory under which trial court found this evidence was relevant); *other grounds vac'd*, 207 Ariz. 314, 86 P.3d 370, ¶ 16 (2004).

*State v. Corona*, 188 Ariz. 85, 932 P.2d 1356 (Ct. App. 1997) (evidence of defendant's other arrests was admissible to rebut suggestion that officers improperly recorded defendant's admission of gang membership).

**404.b.cr.100** If the **extrinsic** evidence of the other crime, wrong, or act is not relevant to any issue being litigated, then the only effect of that evidence is to show that the person has a bad character, and thus it would be error to admit the evidence.

*State v. Prion*, 203 Ariz. 157, 52 P.3d 189, ¶¶ 37–44 (2002) (only similarity between two crimes was that both occurred in Tucson at end of 1992, each involved female victim, and knife or knives were used at some point; differences were one victim was 19-year-old college student and other was 35-year-old street prostitute; court held evidence was not sufficient to establish identity, and to extent this might be considered sexual propensity evidence, state failed to make necessary showing under Rule 404(c), thus evidence would not have been admissible in other trial if both charges were tried separately).

*State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717, ¶ 32 (2001) (trial court allowed expert to testify about effects of methamphetamine usage on perception and memory, but precluded testimony about tendency of methamphetamine users to be violent, paranoid, or aggressive, and precluded testimony that defendant's brother had used methamphetamine around time of crime; because this was character evidence for purpose of showing action in conformance with character, trial court properly precluded this testimony).

*State v. Bocharski*, 200 Ariz. 50, 22 P.3d 43, ¶¶ 35–39 (2001) (defendant allegedly assaulted fellow jail inmate; trial court admitted by stipulation inmate's statement of what defendant said during assault; court held defendant's statement, "If it were up to me, you would be dead right now," had no relevance, thus it was error to admit statement, but any error was harmless in light of other evidence).

*State v. Hoskins*, 199 Ariz. 127, 14 P.3d 977, ¶¶ 54–58 (2001) (prosecutor asked witness when he had last seen defendant, and witness said it was when they both were arrested as juveniles while making "beer run"; court noted witness gave this testimony in violation of trial court's order, but held any error was harmless in light of other evidence presented).

*State v. Lee*, 191 Ariz. 542, 959 P.2d 799, ¶¶ 11–12, 18–19 (1998) (drug courier profile evidence is not admissible on substantive issue of guilt, and reasons for suspicions about defendants and probable cause to arrest were not issues for jurors to determine, thus trial court erred in admitting this evidence, so reversal was required).

*State v. Hughes*, 189 Ariz. 62, 938 P.2d 457 (1997) (because fire bombings were not sufficiently similar to prove identity and were not shown to be part of a particular plan, and because intent was not an issue, trial court erred in admitting other act evidence).

*State v. Hughes*, 189 Ariz. 62, 938 P.2d 457 (1997) (because defendant committed certain of his other acts after the murder, they were irrelevant to whether a certain witness took defendant's threats seriously, thus trial court should not have admitted them).

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*State v. Lacy*, 187 Ariz. 340, 929 P.2d 1288 (1996) (because the subsequent burglary was not similar to the crime charged, trial court erred in admitting it).

*State v. Coghill*, 216 Ariz. 578, 169 P.3d 942, ¶¶ 12–24 (Ct. App. 2007) (defendant was charged with sexual exploitation of minor based on having child pornography on his computer; defendant contended trial court abused discretion in admitting evidence that he had downloaded adult pornography on his computer; court held that evidence showing defendant's ability, willingness, and superior opportunity to download and copy other material from Internet was both relevant and admissible, but nature and content of other downloaded material was either not relevant, or else its probative value was substantially outweighed by danger of unfair prejudice; court further held that, to extent proof of downloading adult pornography made it more likely that defendant would download child pornography, that would be inadmissible character evidence).

*Beijer v. Adams*, 196 Ariz. 79, 993 P.2d 1043, ¶¶ 18–22 (Ct. App. 1999) (because issue at trial was whether defendant committed crime and not why officer stopped defendant, testimony about drug courier profile and why those types of facts made officer suspicious of defendant and caused him to stop defendant was not relevant, and because of prejudicial effect, was not admissible).

*State v. Vigil*, 195 Ariz. 189, 986 P.2d 222, ¶¶ 17–22 (Ct. App. 1999) (no one disputed that defendant was in car, thus identity was not an issue; only issue was whether defendant did or did not shoot gun from car; because defendant's prior and subsequent acts of throwing objects at victim's house did not make it more likely that defendant fired gun at victim, trial court erred in admitting this evidence).

*State v. Garland*, 191 Ariz. 213, 953 P.2d 1266, ¶¶ 23–24 (Ct. App. 1998) (court held similarities—two incidents on same night in same general area, black man named “Mike” wearing baseball cap with “CR” logo and with gun tucked in front of pants—did not show that crimes were similar, only that man or men who perpetrated them were similar, thus trial court should not have joined counts).

*State v. Alatorre*, 191 Ariz. 208, 953 P.2d 1261, ¶¶ 18–19 (Ct. App. 1998) (defendant charged with sexual activities with 8-year-old victim; evidence that defendant struck victim in stomach on unspecified occasion was not evidence of prior sexual offense and thus not propensity, and did not complete the story, and thus should not have been admitted; error was harmless).

*State v. Doody*, 187 Ariz. 363, 930 P.2d 440 (Ct. App. 1996) (because details of witness's prior crimes were not relevant to show motive and bias, trial court properly precluded admission).

404.b.cr.110 The other act must be similar to the crime charged only if the similarity of the act to the crime is the basis for the relevancy of the other act.

*State v. [Van] Adams*, 194 Ariz. 408, 984 P.2d 16, ¶¶ 19–21 (1999) (victim was selling homes; officers found victim's disrobed body under bed upstairs; to show identity, *modus operandi*, intent, knowledge, opportunity, and preparation, state introduced testimony from saleswoman that, 6 years prior, defendant asked her to show him two-story model home and attempted to assault her sexually while there; in order to show identity, state introduced testimony of from another saleswoman that defendant had tried to get her to go upstairs in model home that same day; court noted numerous similarities between events, and held trial court did not abuse discretion in admitting evidence).

## RELEVANCY AND ITS LIMITS

404.b.cr.120 The other act does not have to be criminal in nature to be admissible.

*State v. Robinson*, 165 Ariz. 51, 56–57, 796 P.2d 853, 858–59 (1990) (evidence that defendant twice went to where his girlfriend was staying and forced her to return with him was admissible).

*State v. Castaneda*, 150 Ariz. 382, 390–91, 724 P.2d 1, 9–10 (1986) (trial court properly admitted evidence defendant asked young boy if he and friend would like to earn money doing yard work).

404.b.cr.130 If the other act is criminal in nature, the state does not have to charge the person with the crime for the evidence to be admissible.

*State v. Fierro*, 166 Ariz. 539, 547, 804 P.2d 72, 80 (1990) (trial court properly admitted evidence that home near scene of killing was burglarized 2 nights before killing, and that defendant had in his possession items taken in that burglary).

404.b.cr.140 The other crime, wrong, or act may have occurred either before or after the conduct in question.

*State v. Schurz*, 176 Ariz. 46, 51–52, 859 P.2d 156, 161–62 (1993) (in murder prosecution where defendant allegedly robbed several persons of their beer and then burned to death someone who had said he would have tried to prevent robbery if he had been there, defendant's later actions in robbing another person by holding lighter flame to his neck tended to establish defendant's identity and motive for his earlier actions, and to rebut claim he was too intoxicated to know what he was doing).

*State v. Cook*, 150 Ariz. 470, 472–73, 724 P.2d 556, 558–59 (1986) (defendant's action, after he killed victim, of going to another person's home and firing shots into house admissible to show intent, absence of mistake or accident, credibility of witness, and to complete story). was admissible to complete story of crime).

404.b.cr.150 The amount of time between the charged act and the other act goes to the weight and not the admissibility of the other act.

\* *State v. Cota*, 229 Ariz. 136, 272 P.3d 1027, ¶ 11 (2012) (court held 8 days between murders and defendant's flight went to weight of evidence and not admissibility).

*State v. [Van] Adams*, 194 Ariz. 408, 984 P.2d 16, ¶ 24 (1999) (victim was selling homes; officers found victim's disrobed body under bed upstairs; to show identity, *modus operandi*, intent, knowledge, opportunity, and preparation, state introduced testimony from California saleswoman that, 6 years prior, defendant asked her to show him two-story model home and attempted to assault her sexually while there; length of time between incidents affected weight and not admissibility of evidence).

*State v. Williams*, 209 Ariz. 228, 99 P.3d 43, ¶¶ 14–17 (Ct. App. 2004) (defendant charged with public sexual indecency based on stopping car next to 14- and 15-year old victims and masturbating; trial court admitted for identification purposes evidence of four other acts when defendant was seen masturbating in car; defendant contended trial court erred in admitting one incident because it was over 9 years prior to charged offense; court held trial court did not err because (1) remoteness went to weight and not to admissibility, (2) defendant was in prison for 4 of the 9 years, and the three other acts occurred during intervening years).

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*State v. Bible*, 175 Ariz. 549, 592-93, 858 P.2d 1152, 1195-96 (1993) (because only remorse defendant had about prior sexual assault was he left somebody behind to report him and had been caught, and his statement "I'll never make this mistake again" could be interpreted to mean he would not leave victim alive to testify if he again committed a sex crime, trial court properly admitted evidence of prior assault, and fact statement did not refer to specific victim and was made 3 or 4 years prior to charged offense went to weight and not admissibility).

*State v. Hinchey*, 165 Ariz. 432, 435-36, 799 P.2d 352, 355-56 (1990) (defendant charged with killing victim; trial court admitted evidence of defendant's attack on victim 14 months prior; court held arguments that prior act was too remote in time went to weight and not admissibility).

**404.b.cr.160** Extrinsic evidence of another crime, wrong, or act is relevant to show absence of mistake or accident.

*State v. Lee(I)*, 189 Ariz. 590, 944 P.2d 1204 (1997) (although (1) murders were 9 days apart; (2) both victims were (a) killed with .22 caliber weapon, (b) shot in head, (c) found in same area, (d) required to carry cash, (e) called to scene, and (f) worked out of automobiles, which were vandalized; (3) similar shoe prints were found at both crime scenes; and (4) defendant admitted firing gun in both murders, there was no showing that two murders were part of a single plan, thus murders were not admissible as part of a common scheme or plan, but because defendant claimed that victims tried to pull his gun away and it went off, evidence was admissible to prove absence of mistake or accident).

*State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996) (because defendant denied committing acts of child molestation, evidence of his other acts of similar conduct was not relevant).

*State v. DePiano*, 187 Ariz. 41, 926 P.2d 508 (Ct. App. 1995) (because whether defendant intended to kill herself and her two children or accidentally placed them in dangerous situation was an issue, evidence she had wrongfully taken money from her ex-boyfriend's bank account admissible to show she was sufficiently depressed over her financial condition to be suicidal), *vacated on other grounds*, 187 Ariz. 27, 926 P.2d 494 (1996).

**404.b.cr.190** Extrinsic evidence of another crime, wrong, or act is relevant to show consciousness of guilt.

\* *State v. Cota*, 229 Ariz. 136, 272 P.3d 1027, ¶ 11 (2012) (defendant was charged with first-degree murder; court stated evidence of flight is admissible to show consciousness of guilt when defendant flees in manner that obviously invites suspicion or announces guilt; court held 8 days between murders and defendant's flight went to weight of evidence and not admissibility).

\* *State v. Cota*, 229 Ariz. 136, 272 P.3d 1027, ¶ 12 (2012) (defendant was charged with first-degree murder; defendant contended flight evidence was inadmissible because he may have been fleeing because he had violated probation and had drugs in car; court held evidence of flight is not *per se* inadmissible merely because person is wanted on another charge; court held circumstances justified inference defendant was fleeing from more serious crime).

*State v. Garza*, 216 Ariz. 56, 163 P.3d 1006, ¶¶ 38-39 (2007) (in telephone call from jail, when asked why he was arrested, defendant stated, "Well, remember what you wanted me to do when that one guy beat you up, well I did it to someone else"; court held statement was relevant because it showed consciousness of guilt).

## RELEVANCY AND ITS LIMITS

*State v. Greene*, 192 Ariz. 431, 967 P.2d 106, ¶¶ 20–23 (1998) (because letters were about offense in question, they were not evidence of another crime, wrong, or act; and even if they were, they were admissible to show consciousness of guilt and to rebut claim of remorse).

**404.b.cr.200** Extrinsic evidence of another crime, wrong, or act may be relevant to show credibility.

*State v. Hughes*, 189 Ariz. 62, 938 P.2d 457 (1997) (in jailhouse statement, defendant said he gave juveniles cocaine as payment for committing murder, and evidence that certain juvenile had committed fire bombings would show defendant's control over that juvenile, but because most of witnesses discussed arson in context of defendant's retaliatory character, there was substantial risk jurors considered this evidence for improper purpose).

*State v. Fish*, 222 Ariz. 109, 213 P.3d 258, ¶¶ 41–49 (Ct. App. 2009) (defendant was charged with killing victim; defendant's version of events was that he was hiking on trail when victim's dogs came toward him, so he shot into ground, which caused dogs to disperse; victim then came running toward defendant, so defendant told victim to stop, and when victim did not stop, defendant shot victim three times in chest, killing him; because state attacked defendant's credibility in version he gave of events, and because there were no other witnesses to shooting, and because victim's prior acts were essentially similar to conduct defendant described, trial court should have allowed defendant to introduce evidence of victim's prior acts with his dogs to prove victim's character in order to show victim was acting in conformity with that character when defendant killed him).

**404.b.cr.210** Extrinsic evidence of another crime, wrong, or act is relevant to show identity.

*State v. Johnson*, 212 Ariz. 425, 133 P.3d 735, ¶¶ 7–14 & n.5 (2006) (defendant and codefendant (who was fellow gang member) committed armed robbery; defendant later killed victim of robbery so she could not testify against codefendant; defendant was charged with first-degree murder, burglary, armed robbery, and assisting criminal street gang; because witness elimination to benefit fellow gang member was motive for killing and served to identify defendant, evidence of assisting criminal street gang would have been admissible at trial for other three counts if tried separately, thus counts were properly joined).

*State v. Prion*, 203 Ariz. 157, 52 P.3d 189, ¶¶ 37–44 (2002) (only similarity between two crimes was that both occurred in Tucson at end of 1992, each involved female victim, and knife or knives were used at some point; differences were one victim was 19-year-old college student and other was 35-year-old street prostitute; court held evidence was not sufficient to establish identity, and to extent this might be considered sexual propensity evidence, state failed to make necessary showing under Rule 404(c), thus evidence would not have been admissible in other trial if both charges were tried separately).

*State v. Phillips*, 202 Ariz. 427, 46 P.3d 1048, ¶¶ 16–18 (2002) (black man and white or Hispanic man with bandana on face robbed bar while armed with handgun and sawed-off rifle; 11 days later, defendant and black man robbed bar while armed with handgun and sawed-off rifle; 5 days later, defendant and black man robbed another bar while armed with handgun and sawed-off rifle; because defendant's only defense was misidentification, evidence of other robberies would have been admissible at separate trials for purpose of proving identity, trial court did not err in denying motion to sever).

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*State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717, ¶¶ 62–65 (2001) (evidence that, a few hours before the murders, defendant and another pistol-whipped two men using same type of weapon used in murders, admissible to prove identity).

*State v. Martinez*, 196 Ariz. 451, 999 P.2d 795, ¶¶ 29–33 (2000) (because ballistic evidence showed shell casing found at subsequent robbery was consistent with ammunition used in officer's gun, evidence that defendant committed subsequent robbery was relevant to determination of identity of defendant as person who killed officer).

*State v. [Van] Adams*, 194 Ariz. 408, 984 P.2d 16, ¶¶ 19–21 (1999) (victim was selling homes; officers found victim's disrobed body under bed upstairs; to show identity, *modus operandi*, intent, knowledge, opportunity, and preparation, state introduced testimony from saleswoman that, 6 years prior, defendant asked her to show him two-story model home and attempted to assault her sexually while there; to show identity, state introduced testimony of another saleswoman that defendant had tried to get her to go upstairs in model home that same day; court noted numerous similarities between events, and held trial court did not abuse discretion in admitting evidence).

**404.b.cr.220** In determining whether the **extrinsic** evidence of another crime, wrong, or act is relevant to show *modus operandi* and thus to prove **identity**, the trial court should determine whether there are similarities where normally there would be expected to be differences.

*State v. Lebr*, 227 Ariz. 140, 254 P.3d 379, ¶¶ 19–21 (2011) (defendant noted other attacks occurred at different times and on different days of week, victims varied in age, and other differences; trial court identified extensive similarities; court held other acts need not be perfectly similar to be admissible under this rule).

*State v. [Van] Adams*, 194 Ariz. 408, 984 P.2d 16, ¶¶ 19–21 (1999) (victim was selling homes; officers found victim's disrobed body under bed upstairs; to show identity, *modus operandi*, intent, knowledge, opportunity, and preparation, state introduced testimony from saleswoman that, 6 years prior, defendant asked her to show him two-story model home, and that while there, he attempted to sexually assault her; to show identity, state introduced testimony of another saleswoman that defendant had tried to get her to go upstairs in model home that same day; court noted numerous similarities between events, and held trial court did not abuse discretion in admitting evidence).

*State v. Hughes*, 189 Ariz. 62, 938 P.2d 457 (1997) (only similarities were that both victims were women and both had angered defendant; events were not sufficiently similar to show identity).

*State v. Williams*, 209 Ariz. 228, 99 P.3d 43, ¶¶ 18–21 (Ct. App. 2004) (defendant was charged with public sexual indecency based on his stopping car next to 14- and 15-year old victims and masturbating in car; trial court admitted for identification purposes evidence of four other acts when defendant was seen masturbating in car; defendant contended trial court erred in admitting one incident because it was not sufficiently similar in that victim was 36 years old and was riding bicycle rather than walking; court held incidents were sufficiently similar because (1) both incidents involved one or two victims walking home on street, (2) defendant followed victims in car and never left car, (3) defendant drove car next to victims and stopped car, (4) defendant partially removed clothes and masturbated while driving car, (5) defendant appeared to continue masturbating while partially unclothed and while driving off; court further noted that, for one of other incidents for which defendant had pled guilty, victim was 32 years old).

## RELEVANCY AND ITS LIMITS

*State v. Garland*, 191 Ariz. 213, 953 P.2d 1266, ¶¶ 23–24 (Ct. App. 1998) (court held similarities—two incidents on same night in same general area, black man named “Mike” wearing baseball cap with “CR” logo and with gun tucked in front of pants—did not show that *crimes* were similar, only that man or men who perpetrated them were similar, thus evidence was not admissible to show identity).

404.b.cr.225 Evidence of how drug organizations operate may be admissible to show *modus operandi* of such organization and thus may be relevant.

- \* *State v. Gonzalez*, 229 Ariz. 550, 278 P.3d 328, ¶¶ 8–16 (Ct. App. 2012) (officer stopped vehicle driven by A-P; defendant was passenger; officer ultimately removed windshield of vehicle and found methamphetamine worth \$112,500 hidden in area under windshield; defendant denied knowing drugs were in vehicle; trial court admitted testimony that drug-trafficking organizations have profit motive and do not typically entrust large amounts of drugs to “unknowing transporter” because they need to know person can be trusted and drugs are going to get to destination; court held this evidence was not admitted as drug courier profile evidence, but was instead properly admitted to counter defendant’s contention he did not know drugs were in vehicle).

404.b.cr.230 Extrinsic evidence of another crime, wrong, or act is relevant to show **intent**, but intent is only an issue when the defendant acknowledges doing the act, but denies having the intent the statute requires, thus a blanket denial of criminal conduct does not put intent in issue.

- \* *State v. VanWinkle*, 230 Ariz. 387, 285 P.3d 308, ¶¶ 22–24 (2012) (defendant killed victim while they were inmates in Maricopa County jail; because defendant contended he acted in self-defense and thus was justified in killing victim, state was permitted to introduce evidence of other occasions when defendant attacked others in jail facility without justification).
- \* *State v. Hardy*, 230 Ariz. 281, 283 P.3d 12, ¶¶ 32–39 (2012) (evidence that defendant had prior argument with victim and slapped her, and evidence he was searching for her, all showed defendant’s intent).
- \* *State v. Hardy*, 230 Ariz. 281, 283 P.3d 12, ¶ 41 (2012) (evidence that defendant gave gun to someone and later retrieved it showed defendant intended to kill victims).

*State v. Villalobos*, 225 Ariz. 74, 235 P.3d 227, ¶¶ 17–19 (2010) (defendant was charged with first-degree murder and child abuse as result of death of his girlfriend’s daughter; defendant contended trial court erred in admitting following evidence: (1) 3 months prior, he had violently shaken victim; (2) 2 months prior, he had bruised victim’s face and buttocks; (3) 1 month prior, he had bruised victim’s face; (4) weeks prior, he had bruised victim’s arms; court noted child abuse required proof that defendant intentionally or knowingly injured victim, and held evidence was relevant to establish defendant’s mental state).

*State v. Andriano*, 215 Ariz. 497, 161 P.3d 540, ¶¶ 22–23 (2007) (defendant was charged with first-degree murder of her husband; trial court admitted as intrinsic evidence testimony that defendant attempted to purchase insurance on husband’s life; court held that, although attempts to buy insurance was not intrinsic evidence, it was admissible to show defendant’s intent to kill her husband).

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*State v. [Van] Adams*, 194 Ariz. 408, 984 P.2d 16, ¶¶ 19–21 (1999) (victim was selling homes; in one model home, officers found signs of struggle upstairs and found victim's disrobed body under bed; to show identity, *modus operandi*, intent, knowledge, opportunity, and preparation, state introduced testimony from California saleswoman that, 6 years prior, defendant asked her to show him two-story model home and attempted to assault her sexually while there; in order to show identity, state introduced testimony of another saleswoman that defendant had tried to get her to go upstairs in model home that same day; court noted numerous similarities between events, and held trial court did not abuse discretion in admitting evidence).

*State v. Lee(I)*, 189 Ariz. 590, 944 P.2d 1204 (1997) (although (1) murders were 9 days apart; (2) both victims were (a) killed with .22 caliber weapon, (b) shot in head, (c) found in same area, (d) required to carry cash, (e) called to scene, and (f) worked out of automobiles, which were vandalized; (3) similar shoe prints were found at both crime scenes; and (4) defendant admitted firing gun in both murders, no showing that two murders were part of a single plan, thus murders were not admissible as part of a common scheme or plan, but because defendant claimed that victims tried to pull his gun away and it went off, evidence was admissible to prove intent).

*State v. Hughes*, 189 Ariz. 62, 938 P.2d 457 (1997) (because defendant denied committing the murder, his intent was not an issue, thus other act of firebombing was not admissible).

*State v. Ives*, 187 Ariz. 102, 109–11, 927 P.2d 762, 769–71 (1996) (defendant denied committing acts of child molestation, thus intent was not an issue and evidence of his other acts of similar conduct was not relevant).

*State v. Harrison*, 195 Ariz. 28, 985 P.2d 513, ¶¶ 14–16 (Ct. App. 1998) (in charge of aggravated assault against police officers, because defendant claimed he acted in self-defense, his statement while being transported to police station that, if he had possessed a gun, both he and the officer would have been shot, was admissible to show his desire to harm officer and to refute his claim that he acted in self-defense), *aff'd*, 195 Ariz. 1, 985 P.2d 486 (1999).

*State v. DePiano*, 187 Ariz. 41, 926 P.2d 508 (Ct. App. 1995) (because whether defendant intended to kill herself and her two children was an issue, evidence that she had wrongfully taken money from her ex-boyfriend's bank account was admissible to show she was sufficiently depressed over her financial condition to be suicidal), *vacated on other grounds*, 187 Ariz. 27, 926 P.2d 494 (1996).

**404.b.cr.240 Extrinsic evidence of another crime, wrong, or act relevant to show knowledge.**

*State v. Villalobos*, 225 Ariz. 74, 235 P.3d 227, ¶¶ 17–19 (2010) (defendant charged with first-degree murder and child abuse as result of death of his girlfriend's daughter; he contended trial court erred in admitting evidence: (1) 3 months prior, he had violently shaken victim; (2) 2 months prior, he had bruised victim's face and buttocks; (3) 1 month prior, he had bruised victim's face; (4) weeks prior, he had bruised victim's arms; court noted child abuse required proof that defendant intentionally or knowingly injured victim, and held evidence was relevant to establish defendant's mental state).

*State v. Hargrave*, 225 Ariz. 1, 234 P.3d 569, ¶¶ 20–22 (2010) (defendant contended trial court erred in admitting evidence of guns and ammunition found at defendant's campsite; although defendant and codefendant did not use those guns and that ammunition in charged robbery/murder, because they belonged to codefendant, they were relevant to rebut defendant's defense that he did not know codefendant would be armed during robbery/murder).

## RELEVANCY AND ITS LIMITS

*State v. Andriano*, 215 Ariz. 497, 161 P.3d 540, ¶¶ 22–23 (2007) (defendant charged with first-degree murder of her husband; trial court admitted as intrinsic evidence testimony that defendant attempted to purchase insurance on husband's life; court held that, although attempts to buy insurance was not intrinsic evidence, it was admissible to show defendant's knowledge).

*State v. [Van] Adams*, 194 Ariz. 408, 984 P.2d 16, ¶¶ 19–21 (1999) (victim was selling homes; in one model home, officers found signs of struggle upstairs and found victim's disrobed body under bed; to show identity, *modus operandi*, intent, knowledge, opportunity, and preparation, state introduced testimony from California saleswoman that, 6 years prior, defendant asked her to show him two-story model home and attempted to assault her sexually while there; to show identity, state introduced testimony of another saleswoman that defendant had tried to get her to go upstairs in model home that same day; court noted numerous similarities between events, and held trial court did not abuse discretion in admitting evidence).

*State v. Dickens*, 187 Ariz. 1, 18–19, 926 P.2d 468, 485–86 (1996) (court held evidence that defendant had stolen murder weapon from co-worker was probative for several purposes outlined in Rule 404(b), especially because defendant claimed codefendant procured gun without defendant's knowledge and that he did not participate in underlying felonies).

*State ex rel. Montgomery v. Duncan (Fries)*, 228 Ariz. 514, 269 P.3d 690, ¶¶ 5–8 (Ct. App. Dec. 27, 2011) (38-year-old defendant was charged with four acts of oral sexual intercourse with 15-year-old victim; trial court ruled defendant could cross-examine victim about statement defendant alleged she made to him that she previously had oral sex with two other individuals; court held trial court erred in not balancing to determine whether there was a due process or other constitutional violation that would occur if evidence were precluded and thus remanded for trial court to make that determination; court further held cross-examining victim about her past sexual acts would not be relevant to show what defendant thought about victim's age, and thus held only evidence that would be relevant would be defendant's testimony (should he choose to testify) of how victim's alleged statements about prior acts of oral sex led him to conclude she was at least 18 years of age).

**404.b.cr.250** Extrinsic evidence of another crime, wrong, or act is relevant to show motive.

*State v. Hargrave*, 225 Ariz. 1, 234 P.3d 569, ¶¶ 11–14 (2010) (because victims were members of minority groups, evidence that defendant and codefendant had formed paramilitary group that asserted supremacy of white race and espoused negative views of racial minorities was relevant to show defendant's motive in killing victims).

*State v. Andriano*, 215 Ariz. 497, 161 P.3d 540, ¶¶ 24–26 (2007) (defendant was charged with first-degree murder of her husband; although testimony that defendant had extramarital sex with other men was not admissible as intrinsic evidence, court held that extramarital sex was admissible to show defendant's motive to kill her husband).

*State v. Johnson*, 212 Ariz. 425, 133 P.3d 735, ¶¶ 7–14 & n.5 (2006) (defendant and codefendant (who was fellow gang member) committed armed robbery; defendant later killed victim of robbery so she could not testify against codefendant; defendant was charged with first-degree murder, burglary, armed robbery, and assisting criminal street gang; because witness elimination to benefit fellow gang member was motive for killing and served to identify defendant, evidence of assisting criminal street gang would have been admissible at trial for other three counts if tried separately, thus counts were properly joined).

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*State v. Johnson*, 212 Ariz. 425, 133 P.3d 735, ¶¶ 24–28 (2006) (court held evidence of defendant's gang-related activities was relevant to show motive for killing, which was to eliminate witness, and thus was admissible to prove existence of aggravating circumstance).

*State v. Martinez*, 196 Ariz. 451, 999 P.2d 795, ¶¶ 29–33 (2000) (evidence of warrant for defendant's arrest and that defendant knew of warrant was admissible to show motive for killing).

*State v. Sharp*, 193 Ariz. 414, 973 P.2d 1171, ¶¶ 22–23 (1999) (in trial for kidnapping, sexual assault, and murder, pornographic magazine was relevant to show premeditation because it tended to show defendant's motive in calling victim to room was sexual).

*State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997) (defendant was charged with child abuse for failure to seek treatment for her child after child was injured while in care of defendant's boyfriend; evidence of her relationship with her daughter 1 to 1½ years prior to the crime charged showed that defendant (1) left her daughter with her in-laws from time daughter was 2 months old until she was 2 years old, (2) struck her, and (3) hated her, and showed that defendant was an outgoing, expressive individual who could stand up for herself; because this evidence was relevant to defendant's motive in not seeking treatment for her daughter, it was admissible).

*State v. Ramsey*, 211 Ariz. 529, 124 P.3d 756, ¶¶ 31–34 (Ct. App. 2005) (defendant was charged with continuous sexual abuse of child, which requires proof of three or more acts of sexual conduct with a minor, sexual assault, or child molestation of a child under 14 years of age over a period of 3 months or more; evidence showed that defendant touched daughter's breasts, vagina, and buttocks numerous times over 22-month period; defendant contended evidence of incestuous pornographic material was not relevant; court noted that, although expert testified that interest in pornography does not establish causal relationship with propensity to commit child molestation, expert testified that "it is a link," thus evidence was relevant to establish motive).

*State v. Beasley*, 205 Ariz. 334, 70 P.3d 463, ¶¶ 13–14 (Ct. App. 2003) (defendant was mistakenly released from jail while awaiting trial on other charges; when police located defendant, he shot at them; state charged defendant with aggravated assault and attempted murder; defendant asked trial court to exclude his statement that he had fled because he did not want to return to jail, claiming this was evidence of other crime, wrong, or act; court held statement admissible to show motive for fleeing).

*State v. Mills*, 196 Ariz. 269, 995 P.2d 705, ¶¶ 23–26 (Ct. App. 1999) (defendant and wife were seeking dissolution; defendant was charged with killing wife by paying someone to shoot her; trial court properly admitted evidence that, 2 months prior to shooting, defendant had cut brake lines on wife's truck because this showed defendant's motive to remove wife and eliminate dissolution problems).

*State v. Rivers*, 190 Ariz. 56, 945 P.2d 367 (Ct. App. 1997) (evidence that defendant failed urinalysis and showed cocaine use was admitted to show motive for escape from home arrest).

**404.b.cr.260** Extrinsic evidence of another crime, wrong, or act relevant to show opportunity.

*State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717, ¶¶ 62–65 (2001) (evidence that, a few hours before the murders, defendant and another pistol-whipped two men using same type of weapon used in murders, admissible to show opportunity).

## RELEVANCY AND ITS LIMITS

*State v. [Van] Adams*, 194 Ariz. 408, 984 P.2d 16, ¶¶ 19–21 (1999) (victim was selling homes; in one model home, officers found signs of struggle upstairs and found victim's disrobed body under bed; to show identity, *modus operandi*, intent, knowledge, opportunity, and preparation, state introduced testimony from California saleswoman that, 6 years prior, defendant asked her to show him two-story model home and attempted to assault her sexually that while there; to show identity, state introduced testimony of another saleswoman that defendant had tried to get her to go upstairs in model home that same day; court noted numerous similarities between events, and held trial court did not abuse discretion in admitting evidence).

**404.b.cr.290** Extrinsic evidence of another crime, wrong, or act is relevant to show premeditation.

*State v. Sharp*, 193 Ariz. 414, 973 P.2d 1171, ¶¶ 22–23 (1999) (in trial for kidnapping, sexual assault, and murder, pornographic magazine was relevant to show premeditation because it tended to show defendant's motive in calling victim to room was sexual).

**404.b.cr.300** Extrinsic evidence of another crime, wrong, or act relevant to show preparation.

*State v. [Van] Adams*, 194 Ariz. 408, 984 P.2d 16, ¶¶ 19–21 (1999) (victim was selling homes; in one model home, officers found signs of struggle upstairs and found victim's disrobed body under bed; to show identity, *modus operandi*, intent, knowledge, opportunity, and preparation, state introduced testimony from California saleswoman that, 6 years prior, defendant asked her to show him two-story model home and attempted to assault her sexually while there; to show identity, state introduced testimony of another saleswoman that defendant had tried to get her to go upstairs in model home that same day; court noted numerous similarities between events, and held trial court did not abuse discretion in admitting evidence).

**404.b.cr.320** Extrinsic evidence of another crime, wrong, or act is relevant to rebut areas opened by the other party.

- \* *State v. Van Winkle*, 230 Ariz. 387, 285 P.3d 308, ¶¶ 18–20 (2012) (defendant killed victim while they were inmates in Maricopa County jail; defendant testified "inmate rules" required prisoners to resolve disputes themselves without involving jail staff; because defendant opened door to this area, state was allowed to cross-examine defendant about other situations when he chose not to follow prison facility rules).
- \* *State v. Hausner*, 230 Ariz. 60, 280 P.3d 604, ¶¶ 70–71 (2012) (defendant testified Dieteman was bisexual but he was not, and sexually-themed text messages between them were intended to be humorous, and attempted to distance himself from Dieteman by characterizing their respective sexual orientations; court held trial court properly allowed state to cross-examine defendant about his sexuality and to have wife testify she had seen him kiss another man and once told her he thought he was gay).
- \* *State v. Hausner*, 230 Ariz. 60, 280 P.3d 604, ¶¶ 72–74 (2012) (defendant testified he was not violent person, would never harm person or animal, and would never harm anything; court held trial court properly allowed Dieteman to testify he and defendant set palm tree on fire and slashed tires in casino parking lot; court held Dieteman's testimony he and defendant regularly shoplifted was not admissible to rebut defendant's assertion he was not violent person but was perhaps relevant to rebut defendant's assertion he magnanimously allowed Dieteman to live with him inasmuch as both were earning money stealing; court held any error was harmless).

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- \* *State v. Hausner*, 230 Ariz. 60, 280 P.3d 604, ¶¶ 75–76 (2012) (defendant testified he knew his brother stabbed person but he was not present at stabbing, and had never been present when his brother and Dieteman stabbed person and had not met Dieteman until several days after stabbing; court held trial court properly allowed Dieteman to testify he and defendant were present when Defendant’s brother stabbed person).
- \* *State v. Hausner*, 230 Ariz. 60, 280 P.3d 604, ¶¶ 77–78 (2012) (defendant testified he thought murders were tragic and thought that way during entire trial; court held trial court properly allowed testimony from victim and mother of another victim, both of whom said defendant “had gestured to them by raising his middle finger”).
- \* *State v. Hausner*, 230 Ariz. 60, 280 P.3d 604, ¶¶ 79–80 (2012) (defendant testified he was not violent person; court held trial court properly allowed defendant’s ex-wife to testify about specific incidents of violence, including defendant held her at gunpoint in desert, and chased her in car, caught her, and ripped her clothing).

*State v. Villalobos*, 225 Ariz. 74, 235 P.3d 227, ¶¶ 17–19 (2010) (defendant was charged with first-degree murder and child abuse as result of death of his girlfriend’s daughter; defendant contended trial court erred in admitting following evidence: (1) 3 months prior, he had violently shaken victim; (2) 2 months prior, he had bruised victim’s face and buttocks; (3) 1 month prior, he had bruised victim’s face; (4) weeks prior, he had bruised victim’s arms; court held evidence was relevant to rebut defendant’s claim that he did not intend to hurt victim and hit her as “reflex” as well as his contention that girlfriend could have caused injuries).

*State v. Pandeli*, 215 Ariz. 514, 161 P.3d 557, ¶¶ 44–46 (2007) (defendant introduced evidence of his good behavior in prison to show lack of future dangerousness; evidence of defendant’s aggressive sexual behavior and violent fantasies rebutted that mitigation evidence).

*State v. Pandeli*, 215 Ariz. 514, 161 P.3d 557, ¶¶ 51–56 (2007) (evidence that defendant killed another woman in similar manner to way he killed victim rebutted testimony of defendant’s expert by showing that defendant did not act impulsively).

*State v. Andriano*, 215 Ariz. 497, 161 P.3d 540, ¶¶ 24–27 (2007) (defendant charged with first-degree murder of husband; although testimony that defendant had extramarital sex with other men was not admissible as intrinsic evidence, it was admissible to rebut defense theory that defendant was domestic violence victim who lived in fear of her abusive husband).

*State v. Andriano*, 215 Ariz. 497, 161 P.3d 540, ¶ 29 (2007) (after defendant’s expert testified that defendant needed to use personal lubricant when she had sex with her husband, prosecutor’s asking expert whether defendant needed to use personal lubricant when she had sex with her extramarital affair was permissible to rebut expert’s suggestion that defendant needed to use personal lubricant with her husband because her husband was abusive spouse).

*State v. Greene*, 192 Ariz. 431, 967 P.2d 106, ¶¶ 20–23 (1998) (because letters were about offense in question, they were not evidence of another crime, wrong, or act; and even if they were, they were admissible to show consciousness of guilt and to rebut claim of remorse).

*State v. Connor*, 215 Ariz. 553, 161 P.3d 596, ¶¶ 37–38 (Ct. App. 2007) (defendant was charged with first-degree murder; evidence showed victim had been victim of check-cashing scheme and that victim’s mother told him to stay away from anyone asking him to cash checks for them;

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evidence that defendant had asked victim to cash checks admissible to rebut defendant's testimony that he was friends with victim and was welcome in his apartment).

*State v. Mills*, 196 Ariz. 269, 995 P.2d 705, ¶¶ 23–26 (Ct. App. 1999) (defendant and wife were seeking dissolution; defendant was charged with killing his wife by paying someone to shoot her; evidence that, 2 months prior to shooting, defendant had cut brake lines on wife's truck admissible to rebut defendant's claim that he loved her, wanted to get back together with her, and would not want any harm to come to her).

*State v. Harrison*, 195 Ariz. 28, 985 P.2d 513, ¶¶ 14–16 (Ct. App. 1998) (in charge of aggravated assault against police officers, because defendant claimed he acted in self-defense, his statement while being transported to police station that, if he had possessed a gun, both he and the officer would have been shot, was admissible to show his desire to harm officer and to refute his claim that he acted in self-defense), *aff'd*, 195 Ariz. 1, 985 P.2d 486 (1999).

**404.b.cr.320** Extrinsic evidence of another crime, wrong, or act is relevant to rebut defendant's justification defense.

\* *State v. VanWinkle*, 230 Ariz. 387, 285 P.3d 308, ¶¶ 22–24 (2012) (defendant killed victim while they were inmates in Maricopa County jail; because defendant contended he acted in self-defense and was thus justified in killing victim, state was permitted to introduce evidence of other occasions when defendant attacked others in jail facility without justification).

**404.b.cr.330** Extrinsic evidence of another crime, wrong, or act is relevant when sanity or mental state is an issue.

*State v. Roque*, 213 Ariz. 193, 141 P.3d 368, ¶¶ 53–59 (2006) (after 9/11/01, defendant said he wanted to shoot some "rag heads," referring to people defendant perceived to be of Arab descent; after drinking 75 ounces of beer, defendant shot and killed Sikh of Indian descent who wore turban, and shot at several other people at other locations; state's theory of case was that shootings were intentional acts of racism while intoxicated; defendant pursued insanity defense; in assessing defendant's mental health, state's expert testified that he considered defendant's 1983 conviction for attempted robbery; court noted that evidence of prior conviction is generally admissible when insanity is issue, but this evidence had only minimal probative value because there was no showing that robbery was alcohol induced or product of racism; however, although probative value was minimal, so was any prejudicial effect).

*In re Leon G.*, 199 Ariz. 375, 18 P.3d 169, ¶ 11 (Ct. App. 2001) (because issue was whether person was likely to commit further acts of sexual violence, doctor was permitted to rely on person's past improper sexual activities in forming opinion, and was permitted to disclose factual basis for that opinion).

**404.b.cr.450** Extrinsic evidence of another crime, wrong, or act is relevant to show state of mind.

*State v. Taylor*, 169 Ariz. 121, 124–25, 817 P.2d 488, 491–92 (1991) (evidence of victim's prior conviction for child abuse admissible because defendant knew of this conviction, and it was relevant to determine whether defendant was justifiably apprehensive about his own safety and safety of two children in apartment).

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*State v. Pierce*, 170 Ariz. 527, 530, 826 P.2d 1153, 1156 (Ct. App. 1991) (evidence of other times 46-year-old defendant molested 12-year-old victim admissible to show defendant's state of mind when he molested victim on occasions charged).

**404.b.cr.460** In death penalty case based on felony murder, extrinsic evidence of another crime, wrong, or act is relevant to show defendant acted with **reckless indifference**.

*State v. Garcia*, 224 Ariz. 1, 226 P.3d 370, ¶¶ 32–39 (2010) (defendant was convicted of felony murder based on robbery he committed with S. where S. killed victim; evidence that defendant had committed separate robbery with S. 5 weeks earlier where S. had shot victim was admissible to show defendant acted with reckless indifference during subject robbery and killing).

**404.b.cr.470** In death penalty case, extrinsic evidence of another crime, wrong, or act is relevant to show an **aggravating circumstance**.

*State v. Garcia*, 224 Ariz. 1, 226 P.3d 370, ¶¶ 32–39 (2010) (evidence that defendant was convicted of committing robbery that happened 5 weeks before present robbery/felony murder was admissible to show (F)(2) prior conviction aggravating circumstance).

**404.b.cr.480** Although only the fact of a prior conviction is admissible for impeachment under Rule 609(a), the facts underlying the prior conviction may also be relevant for purposes specified in Rule 404(b).

*State v. Smith*, 146 Ariz. 491, 499–500, 707 P.2d 289, 297–98 (1985) (in addition to being admissible to show character for truthfulness, evidence of defendant's conviction for three prior robberies of convenience stores admissible to show identity).

**404.b.cr.490** The list of "other purposes" in Rule 404(b) is not exhaustive; if the evidence is relevant for any purpose other than to show the defendant's criminal character, it is admissible even though it refers to other crimes, wrongs, or acts.

*State v. Smith*, 170 Ariz. 481, 482–83, 826 P.2d 344, 345–46 (Ct. App. 1992) (evidence of codefendants' tattoos relevant to explain why robbers were careful to cover their arms and torsos).

*State v. Tassler*, 159 Ariz. 183, 185, 765 P.2d 1007, 1009 (Ct. App. 1988) (evidence of prior domestic disturbance and defendant's statement, "After the last time, I made up my mind that I was going to kill the next cop that came through the door," was relevant in determining whether defendant sought to use knife and whether force used by officers was excessive).

*State v. Schackart*, 153 Ariz. 422, 424, 737 P.2d 398, 400 (Ct. App. 1987) (defendant claimed consent; defendant's prior acts with victim admissible to show victim's state of mind when engaging in sexual intercourse with defendant).

**404.b.cr.500** Evidence of another crime, wrong, or act is admissible if it is factually or conditionally relevant, which means the proponent is able to produce sufficient evidence from which the trier-of-fact could conclude, by clear and convincing evidence, that the other act happened, the person committed the act, and the circumstances of that act were as the proponent claims; proof beyond a reasonable doubt is not necessary.

*State v. Anthony*, 218 Ariz. 439, 189 P.3d 366, ¶¶ 33–37 & n.7 (2008) (defendant was convicted of killing his wife and step-children; trial court allowed state to present evidence tending to show defendant molested 14-year old step-daughter; state argued that molestation was defendant's motive for killing her; court stated that, although jurors must ultimately determine

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whether other act is proved, trial court must find that there is clear and convincing proof both that other act was committed and that defendant committed that other act; court concluded there was not enough evidence for jurors to conclude by clear and convincing evidence that other act (molestation of step-daughter) occurred, and thus reversed conviction).

*State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717, ¶ 57 (2001) (to establish that defendant conspired with third person to commit separate robbery, at trial state presented testimony of third person, evidence that details of place to be robbed were as defendant described, and testimony that defendant and third person lived and socialized together at time of robbery; court held this established other act by clear and convincing evidence).

*State v. Terrazas*, 189 Ariz. 580, 944 P.2d 1194 (1997) (court rejected by a preponderance of the evidence test for criminal cases, and found that evidence of other act not sufficient for admission).

*State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997) (because there was sufficient evidence from which the jurors could conclude defendant (1) left her daughter with her in-laws from 2 months old until 2 years old, (2) struck her, and (3) hated her, trial court properly admitted this evidence).

*State v. Smyers*, 205 Ariz. 479, 73 P.3d 610, ¶¶ 6–8 (Ct. App. 2003) (defendant was charged with furnishing harmful items to 11-year-old minor as result of showing her pictures on computer screen of man and woman engaged in sexual intercourse; trial court ruled state could admit evidence that defendant had kissed victim on lips, tried to “French kiss” her by sticking his tongue in her mouth, and hugging her by placing his hands on her “butt” and pulling her against his body; trial court found victim’s testimony to be sufficiently clear and convincing; court held trial court did not abuse discretion in admitting this evidence); *other grounds vac’d*, 207 Ariz. 314, 86 P.3d 370, ¶ 16 (2004).

*State v. Vigil*, 195 Ariz. 189, 986 P.2d 222, ¶¶ 15–16 (Ct. App. 1999) (because there was no indication on record that trial court used clear and convincing standard, there was no indication trial court used proper standard).

*State v. Uriarte*, 194 Ariz. 275, 981 P.2d 575, ¶¶ 35–37 (Ct. App. 1998) (defendant charged with multiple counts for sexual crimes involving his 12-year-old sister-in-law; jurors convicted defendant of two counts, could not reach verdict on one, and acquitted on remainder; on second trial for count where jurors could not reach verdict, in order to show common scheme or plan and sexual propensity, state sought admission of counts where jurors acquitted; trial court ruled it would allow admission of those counts if state could show by preponderance of evidence that those events took place; court held that trial court used wrong standard and that error was not harmless, and thus reversed conviction).

404.b.cr.503 In determining whether the proponent has sufficient evidence from which the trier-of-fact could conclude, by clear and convincing evidence, that the other act happened, the person committed the act, and the circumstances of that act were as the proponent claims, the trial court is not required to hold an evidentiary hearing at which the proponent would have to produce its witnesses and have the other party cross-examine them; the trial court is instead required to make a determination of the admissibility of the evidence under Rule 104(a), which provides that the trial court is not bound by the rules of evidence in making that ruling.

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*State v. LeBrun*, 222 Ariz. 183, 213 P.3d 332, ¶¶ 5–16 (Ct. App. 2009) (state sought to join for trial four cases with 13 counts of sexual conduct with minor and child molestation, and sought to introduce other act evidence of defendant's conduct with four other boys; trial court refused defendant's request for live evidentiary hearing and instead reviewed video and audio tapes of statements made by victims; court held that trial court's review of tapes was sufficient for it to determine whether state had sufficient evidence from which jurors could conclude by clear and convincing evidence that defendant committed other acts).

404.b.cr.505 Because the state must prove a crime beyond a reasonable doubt, but must only prove other acts by clear and convincing evidence, trial court may admit evidence of crimes for which defendant has been acquitted without violating prohibition against double jeopardy.

*State v. Lebr*, 227 Ariz. 140, 254 P.3d 379, ¶ 26 (2011) (in trial involving multiple victims, fact that at previous trial state had failed to prove murder of victim B.C. was especially heinous, cruel, or depraved did not preclude state from introducing that evidence under Rule 404(b)).

\* *State v. Yonkman*, 229 Ariz. 291, 274 P.3d 1225, ¶¶ 16–21 (Ct. App. 2012) (defendant was charged with sexual abuse and sexual contact with 15-year-old step-daughter; court held trial court properly allowed admission of evidence defendant had molested two of victim's friends, even though defendant had been found not guilty of those charges).

*State v. Uriarte*, 194 Ariz. 275, 981 P.2d 575, ¶ 38 (Ct. App. 1998) (defendant was charged with multiple counts of child molestation, sexual conduct with minor, and public sexual indecency involving his 12-year-old sister-in-law; jurors convicted defendant of two counts, could not reach verdict on one, and acquitted on remainder; on second trial for count where jurors could not reach verdict, in order to show common scheme or plan and sexual propensity, state sought admission of counts where jurors acquitted; court held that, under analysis of federal law, admission of this evidence would not violate prohibition against double jeopardy, but it still was open question under Arizona law).

404.b.cr.600 The trial court may exclude evidence of other crimes, wrongs, or acts under Rule 403 if the opponent objects on that basis and trial court determines that the probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jurors, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; because this is an extraordinary remedy, it should be used sparingly.

*State v. [Van] Adams*, 194 Ariz. 408, 984 P.2d 16, ¶¶ 22–23 (1999) (victim was selling homes; in one model home, officers found signs of struggle upstairs and found victim's disrobed body under bed; to show identity, *modus operandi*, intent, knowledge, opportunity, and preparation, state introduced testimony from California saleswoman that, 6 years prior, defendant asked her to show him two-story model home and attempted to assault her sexually while there; court stated that victim made no inflammatory remarks about defendant, and thus testimony was not unfairly prejudicial).

*State v. [Van] Adams*, 194 Ariz. 408, 984 P.2d 16, ¶¶ 22–23 (1999) (victim was selling homes; in one model home, officers found signs of struggle upstairs and found victim's disrobed body under bed; to show identity, state introduced testimony of another subdivision saleswoman that defendant had tried to get her to go upstairs in model home that same day; court noted victim stated she did not believe defendant was there to buy house and she was uneasy because defendant walked close to her; court stated this testimony was not related to issue of identity and

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thus prejudicial effect may have outweighed probative value, but this was only small portion of overall testimony, so any error would have been harmless).

*State v. Lee(I)*, 189 Ariz. 590, 944 P.2d 1204 (1997) (although evidence of other murder was harmful to defense, not all harmful evidence is unfairly prejudicial; no showing that jurors were improperly influenced by emotion or horror).

*State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997) (defendant objected to other act evidence on basis of prejudice; because there was nothing to show that this evidence was *unfairly* prejudicial, trial court did not abuse its discretion in admitting it).

*State v. Williams*, 209 Ariz. 228, 99 P.3d 43, ¶¶ 22–23 (Ct. App. 2004) (defendant charged with public sexual indecency based on his stopping car next to 14- and 15-year old victims and masturbating; trial court admitted for identification purposes evidence of four other acts when defendant was seen masturbating in car; because defendant contended someone else committed offenses, identity was issue; court concluded trial court did not abuse discretion in determining that probative value was not substantially outweighed by the danger of unfair prejudice).

404.b.cr.620 When evidence has both probative value and elements that make it unfairly prejudicial, trial court need not require wholesale proscription; it should instead determine (1) whether probative value of evidence is sufficient that it should be admitted in some form, (2) what restrictions should be placed on use of evidence by jury instructions, and (3) whether evidence can be narrowed or limited to reduce its potential for unfair prejudice while preserving probative value.

*State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717, ¶¶ 62–65 (2001) (evidence that, a few hours before the murders, defendant and another pistol-whipped two men using same type of weapon used in murders, admissible to prove identity and to show opportunity; trial court adequately protected against any unfair prejudice by limiting admissibility to only those facts necessary to establish defendant was armed with type of weapon used in murders and in company of other alleged perpetrator).

*State v. Martinez*, 196 Ariz. 451, 999 P.2d 795, ¶¶ 29–33 (2000) (because ballistic evidence showed shell casing found at subsequent robbery was consistent with ammunition used in officer's gun, evidence that defendant committed subsequent robbery was relevant to determination of identity of defendant as person who killed officer; because trial court allowed admission only of evidence of robbery and use of weapon, and precluded evidence that defendant shot and killed store clerk during robbery, trial court adequately protected defendant against unfair prejudice).

*State v. Hughes*, 189 Ariz. 62, 938 P.2d 457 (1997) (evidence of defendant's drug involvement with victim was relevant to motive, but trial court erred in admitting cumulative evidence because it went far beyond that necessary to establish motive, thus trial court should have limited this evidence to its probative essence by excluding irrelevant or inflammatory detail).

*State v. Baldenegro*, 188 Ariz. 10, 932 P.2d 275 (Ct. App. 1996) (in charge of assisting and participating in criminal syndicate for benefit of street gang, state had to prove "Carson 13" was a criminal street gang, thus evidence of criminal activity by members of "Carson 13" was relevant and had substantial probative value; trial court limited prejudicial effect by excluding specific names and instances of criminal conduct by "Carson 13" members; trial court therefore did not abuse discretion by admitting this evidence).

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**404.b.cr.630** The trial court does not have to make explicit findings about balancing prejudicial effect against probative value when record is clear parties argued factors to the trial court, and the trial court considered them and balanced them.

*State v. Beasley*, 205 Ariz. 334, 70 P.3d 463, ¶¶ 15 (Ct. App. 2003) (defendant was mistakenly released from jail while awaiting trial on other charges; when police located defendant, he fired shots at them; state charged defendant with aggravated assault and attempted murder; defendant asked trial court to exclude his statement that he had fled because he did not want to return to jail, claiming this was evidence of other crime, wrong, or act; court held statement admissible to show motive for fleeing; court noted parties argued probative value and prejudice to trial court, and that record showed trial court balanced these factors before admitting evidence, thus specific findings were not necessary).

**404.b.cr.700** An instruction that informs the jurors of the limitation on the use for which they may consider this type of evidence adequately protects the defendant, it being presumed that the jurors follow that instruction.

*State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717, ¶¶ 62–65 (2001) (evidence that, a few hours before the murders, defendant and another pistol-whipped two men using same type of weapon used in murders, admissible to prove identity and to show opportunity; trial court gave jurors instruction on limited use for which jurors could consider evidence).

*State v. Lee(I)*, 189 Ariz. 590, 944 P.2d 1204 (1997) (trial court instructed jurors that the state must prove each element of charges beyond a reasonable doubt, and instructed jurors on each of the 12 verdict forms and charges to which forms related; because defendant did not request a more specific instruction, he waived any error).

*State v. DePiano*, 187 Ariz. 41, 926 P.2d 508 (Ct. App. 1995) (trial court gave proper limiting instruction to circumscribe jurors' consideration of evidence of other acts), *vacated on other grounds*, 187 Ariz. 27, 926 P.2d 494 (1996).

**404.b.cr.720** If the defendant requests an instruction informing jurors of the limitation on the use for which they may consider this type of evidence, the trial court must give it, but if the defendant does not request such an instruction, the trial court is not required to give it *sua sponte*.

\* *State v. VanWinkle*, 230 Ariz. 387, 285 P.3d 308, ¶ 24 (2012) (defendant killed victim while they were inmates in Maricopa County jail; to rebut defendant's self-defense/justification defense, trial court admitted evidence of other occasions when defendant attacked others in jail facility without justification; defendant did not request limiting instruction).

*State v. Lee(I)*, 189 Ariz. 590, 944 P.2d 1204 (1997) (trial court instructed jurors that the state must prove each element of charges beyond a reasonable doubt, and instructed jurors on each of the 12 verdict forms and charges to which forms related; because defendant did not request a more specific instruction, he waived any error).

*State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997) (defendant neither requested a limiting instruction nor objected when trial court did not give one).

*State v. Miles*, 211 Ariz. 475, 123 P.3d 669, ¶¶ 31–32 (Ct. App. 2005) (defendant caused collision that injured victim; state charged defendant with DUI, aggravated assault, endangerment, and criminal damage; court granted motion for judgment of acquittal for DUI and instructed jurors to disregard any evidence presented to support DUI counts and any evidence about alcohol;

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defendant contended trial court erred in not giving limiting instruction for his prior misdemeanor DUI convictions; court held trial court was not required *sua sponte* to give limiting instruction).

*State v. Smyers*, 205 Ariz. 479, 73 P.3d 610, ¶¶ 6–8 (Ct. App. 2003) (defendant was charged with furnishing harmful items to 11-year-old minor as result of showing her pictures on computer screen of man and woman engaged in sexual intercourse; trial court ruled state could admit evidence that defendant had kissed victim on lips, tried to “French kiss” her by sticking his tongue in her mouth, and hugging her by placing his hands on her “butt” and pulling her against his body; trial court gave jurors limiting instruction); *other grounds vac’d*, 207 Ariz. 314, 86 P.3d 370, ¶ 16 (2004).

**404.b.cr.730** Because the party opposing the other act evidence has the right to argue that the evidence is not prejudicial, an instruction that refers to other “bad” acts is error.

*State v. Corona*, 188 Ariz. 85, 932 P.2d 1356 (Ct. App. 1997) (trial court gave instruction on limited use of “other bad acts” of defendant; court held this was error, but not fundamental).

**404.b.cr.735** If the instruction properly instructs the jurors they are not to consider the other act to prove character or to prove action in conformity with that character, it is not error if the instruction refers to “bad character.”

*State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717, ¶ 84 (2001) (instruction told jurors they were not to consider other act “to prove the defendant is a person of bad character or that the defendant acted in conformity with that bad character”).

**404.b.cr.740** When other act evidence is admitted for a specific purpose, it is not error to instruct jurors that they may consider the evidence to show such things as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident because the conjunction “or” allows the jurors to disregard those uses that are not supported by the evidence.

*State v. [Van] Adams*, 194 Ariz. 408, 984 P.2d 16, ¶¶ 25–26 (1999) (defendant was charged with killing victim after what appeared to be sexual assault; trial court admitted evidence that he sexually assaulted prior victim but did not kill her, and instructed jurors that they could consider other act evidence “only as it relates to the defendant’s opportunity, intent, preparation, knowledge, or identity”; court rejected defendant’s contention that trial court should have further limited this evidence to identity and *modus operandi*).

**404.b.cr.750** If the testimony about the other act is such that the jurors have likely learned defendant was tried and found not guilty of the other act, it is appropriate to instruct the jurors defendant was found not guilty.

\* *State v. Yonkman*, 229 Ariz. 291, 274 P.3d 1225, ¶¶ 22–26 (Ct. App. 2012) (because court reversed conviction on other grounds, court stated it need not address issue whether trial court abused its discretion in not giving such an instruction; court stated, “In any retrial, we trust the court will evaluate the issue in light of the standards set forth above.”).

**404.b.cr.800** Depending on the nature of the crime charged and nature of the other crime, wrong, or act, admission of evidence of the other crime, wrong, or act may be harmless error.

*State v. Dann*, 205 Ariz. 557, 74 P.3d 231, ¶¶ 40–46 (2003) (witness testified that, after defendant told her he killed three people, she encouraged him to turn himself in, to which he replied,

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“That’s not an option; I can’t go back to jail”; defendant contended this was inadmissible other act evidence and requested mistrial; court held this testimony constituted error, but concluded that, in light of totality of evidence presented against defendant and trial court’s limiting instruction, there was no probability verdict would have been different if jurors had not heard testimony).

*State v. Lamar*, 205 Ariz. 431, 72 P.3d 831, ¶¶ 38–44 (2003) (trial court had granted defendant’s request to preclude evidence that Richard, in defendant’s presence, threatened Hogan by asking her if she would like to be buried next to Jones (victim in this case); at trial, prosecutor asked Hogan if anyone made threats against her in defendant’s presence, and she responded, “When Richard said they was [*sic*] going to bury me next to—,” whereupon defendant objected and asked for mistrial, which trial court denied; court noted trial court had concluded evidence of Richard’s threat was hearsay, but held any error was harmless because (1) statement did not necessarily implicate defendant, and (2) trial court instructed jurors to disregard testimony).

*State v. Hoskins*, 199 Ariz. 127, 14 P.3d 977, ¶¶ 54–58 (2001) (prosecutor asked witness when he had last seen defendant, and witness said it was when they both were arrested as juveniles while making “beer run”; court noted witness gave this testimony in violation of trial court’s order, but held any error was harmless in light of other evidence presented).

*State v. Jones*, 197 Ariz. 290, 4 P.3d 345, ¶¶ 30–35 (2000) (witness gave unsolicited testimony that defendant (1) was paroled felon, (2) after murders, borrowed duct tape to use in subsequent robbery, and (3) was subsequently incarcerated; court held that, because these were merely vague reference to unproved crimes and because trial court gave limiting instruction, testimony not grounds for reversal).

### Paragraph (c) — Character evidence in sexual misconduct cases.

#### Civil Cases

404.c.civ.010 A sexually violent persons case is civil in nature; in a civil case, Rule 404(c) allows for the admission of other act evidence when the claim is predicated on a party’s alleged commission of a sexual offense, which means a sexual offense that the person is alleged to have committed in the past; in a SVP case, the state must prove (1) the person has been convicted of or found guilty but insane of a sexually violent offense, thus this is not an “alleged” offense, and (2) the person has a mental disorder that makes the person likely to engage in acts of sexual violence, which again does not require proof of an “alleged” offense; because a SVP cases does not require proof of an “alleged” offense, Rule 404(c) does not apply in SVP cases.

*In re Jaramillo*, 217 Ariz. 460, 176 P.3d 28, ¶¶ 5–10 (Ct. App. 2008) (in 1996, Jaramillo pled guilty but insane to attempted sexual conduct with minor; in 2006, state filed petition alleging Jaramillo was sexually violent person; at trial, psychiatrist testified about three prior acts: 1992 touching of 11-year-old female; 1992 exposing himself and touching woman on buttocks; and 1993 touching of woman’s buttocks, crotch, and chest; because 1996 attempted sexual conduct with minor was offense to which Jaramillo pled, it was not “alleged” offense; because state only had to prove mental disorder, it did not have to prove Jaramillo committed 1992 and 1993 offenses; thus there were no “alleged” offenses state had to prove, thus Rule 404(c) did not apply).

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### Criminal Cases

**404.c.cr.010** In a case in which a defendant or a party is alleged to have committed a sexual offense, evidence of other crimes, wrongs, or acts may be admitted to show the defendant or person had a character trait giving rise to an aberrant sexual propensity to commit the alleged sexual offense.

\* *State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509, ¶¶ 12–13 (2012) (court stated evidence of defendant's other sexual acts with same victim might be admissible under Rule 404(b) or Rule 404(c)).

*State v. Aguilar*, 209 Ariz. 40, 97 P.3d 865, ¶ 28 (2004) (court concluded that non-consensual heterosexual contact between adults could show aberrant sexual propensity).

**404.c.cr.020** Before admitting evidence that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the alleged sexual offense, the trial court must go through the analysis stated in Rule 404(c)(1)(A)–(C), and make the findings required by those sections.

*State v. Aguilar*, 209 Ariz. 40, 97 P.3d 865, ¶ 33 (2004) (trial court made findings, but court concluded that evidence trial court considered was not sufficient to make necessary finding).

*State v. Vega*, 228 Ariz. 24, 262 P.3d 628, ¶¶ 9–25 (Ct. App. 2011) (defendant was charged with committing sexual crimes against his two nieces, ages 6 and 11; trial court admitted evidence defendant had improperly touched 11-year-old several months prior to charged incidents; court did not decide whether that evidence would have been admissible under Rule 404(b); court held it could have been admissible under Rule 404(c), but held trial court erred in not making analysis and findings required by that rule, but held any error was harmless in light of evidence admitted to prove charged offenses).

**404.c.cr.030** Sexual propensity evidence must be admissible under applicable rules of criminal procedure.

*State v. Williams*, 209 Ariz. 228, 99 P.3d 43, ¶¶ 40–44 (Ct. App. 2004) (defendant was charged with public sexual indecency based on his stopping car next to 14- and 15-year old victims and masturbating in car; trial court admitted for identification purposes evidence of four other acts when defendant was seen masturbating in car; court held trial court erred in admitting evidence of defendant's statements made in connection with preparation of presentence report from 1999 incident, but held that any error was harmless in light of fact that jurors heard testimony from victim and investigating officers from 1999 incident, and fact that defendant did not contest that 1999 incident occurred).

**404.c.cr.040** Evidence that the defendant committed the other acts against the same victim is admissible to show the defendant's lewd disposition or unnatural attitude toward the particular victim, but the trial court must still go through the analysis stated in Rule 404(c)(1)(A)–(C).

*State v. Prion*, 203 Ariz. 157, 52 P.3d 189, ¶¶ 37–44 (2002) (only similarity between two crimes was that both occurred in Tucson at end of 1992, each involved female victim, and knife or knives were used at some point; differences were one victim was 19-year-old college student and other was 35-year-old street prostitute; court held evidence was not sufficient to establish identity, and to extent this might be considered sexual propensity evidence, state failed to make necessary showing under Rule 404(c), thus evidence would not have been admissible in other trial if both charges were tried separately).

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*State v. Ramsey*, 211 Ariz. 529, 124 P.3d 756, ¶ 35 (Ct. App. 2005) (defendant was charged with continuous sexual abuse of child, which requires proof of three or more acts of sexual conduct with a minor, sexual assault, or child molestation of a child under 14 years of age over a period of 3 months or more; evidence showed that defendant touched daughter's breasts, vagina, and buttocks numerous times over 22-month period; defendant contended evidence of incestuous pornographic material was not relevant; court noted that trial court made specific findings required by Rule 404(c), and rejected defendant's contention that trial court was without authority to admit evidence under Rule 404(c) because state had not sought to admit evidence under that rule).

*State v. Garcia*, 200 Ariz. 471, 28 P.3d 327, ¶¶ 34–37 (Ct. App. 2001) (trial court ruled it would allow admission of evidence of sexual acts by defendant against same victim and that it did not need to go through Rule 404(b) or Rule 404(c) analysis; court held such analysis was necessary even when other acts were against same victim).

404.c.cr.050 If inadmissible evidence is presented, the appropriate remedy is within the discretion of the trial court.

*State v. Williams*, 209 Ariz. 228, 99 P.3d 43, ¶¶ 45–49 (Ct. App. 2004) (defendant was charged with public sexual indecency based on his stopping car next to 14- and 15-year old victims and masturbating in car; trial court admitted for identification purposes evidence of four other acts when defendant was seen masturbating in car; prosecutor asked detective from 1993 incident whether he had arrested defendant, and detective said he did; court held that, assuming answer violated trial court's order not to introduce evidence of defendant's prior "convictions" and was error, any error was harmless in light of all other evidence presented in case).

### Paragraph (c)(1)(A) — Character evidence in sexual misconduct cases—Sufficiency of evidence.

404.c.1.A.cr.010 Before admitting evidence of another act in a sexual misconduct case, the trial court must find that the evidence is sufficient to permit the trier-of-fact to find by clear and convincing evidence that the defendant committed the other act.

*State v. Dixon*, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 12–14 (2011) (defendant was convicted of felony murder with sexual assault as charged predicate felony; trial court admitted evidence that defendant had prior conviction for sexual assault; because previous jurors had found defendant guilty beyond reasonable doubt of sexual assault, prosecutor presented sufficient evidence from which jurors could conclude by clear and convincing evidence that defendant had committed prior offense).

*State v. Aguilar*, 209 Ariz. 40, 97 P.3d 865, ¶ 30 (2004) (court stated that "the trial court must determine that clear and convincing evidence supports a finding that the defendant committed the other act," and cited Rule 404(c)(1)(A) as authority).

*State v. Marshall*, 197 Ariz. 496, 4 P.3d 1039, ¶¶ 2–7 (Ct. App. 2000) (trial court denied defendant's motion to sever two counts alleging sexual conduct with minor in March 1995 with 16 counts alleging sexual conduct with same minor over 4-day period in October 1996; court concluded evidence of 16 counts would have been admissible at separate trial on other two counts; on issue of proof, court held that, assuming *arguendo* victim's testimony about first two counts was not sufficient, videotape of act underlying other counts would provide sufficient proof).

## RELEVANCY AND ITS LIMITS

*State v. Arner*, 195 Ariz. 394, 988 P.2d 1120, ¶¶ 6 (Ct. App. 1999) (defendant charged with molesting 10-year-old boy; at trial, witness testified that 3 years earlier when he was 11 years old, he and defendant were watching television, and defendant rubbed the witness's penis through his clothes).

**404.c.1.A.cr.020** If there are conflicting versions of the other act evidence, the trial court must make a credibility determination in assessing whether the evidence is sufficient to permit the trier-of-fact to find that the defendant committed the other act.

*State v. Aguilar*, 209 Ariz. 40, 97 P.3d 865, ¶¶ 30–35 (2004) (defendant was charged with three counts of sexual assault against three different victims; both defendant and victims agreed that defendant had sexual contact with victims, but defendant claimed acts were consensual, while victims contended acts were done without their consent; because determination of what actually happened depended largely on credibility of witnesses, trial court had to make credibility determination that victims' accounts were more credible than defendant's account; because trial court limited its review to grand jury transcripts (when only police officer testified), pleadings, and arguments of counsel, trial court neither heard from victims nor was presented with any prior testimony from them, thus material trial court considered was not sufficient to make required determination under Rule 404(c) (1)(A)).

### **Paragraph (c)(1)(B) — Character evidence in sexual misconduct cases—Aberrant sexual propensity.**

**404.c.1.B.cr.010** Before admitting character evidence in a sexual misconduct case, the trial court must first find the commission of the other act provides a reasonable basis to infer the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.

*State v. Lehr*, 227 Ariz. 140, 254 P.3d 379, ¶¶ 19–20 (2011) (state presented expert testimony and trial court found evidence provided reasonable basis to infer defendant had character trait giving rise to aberrant sexual propensity to commit violent and sexual acts against non-consenting females).

*State v. Dixon*, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 12–15 (2011) (defendant was convicted of felony murder with sexual assault as charged predicate felony; trial court admitted evidence that defendant had prior conviction for sexual assault; because expert testified about similarities between prior sexual assault and charged offense and opined that defendant had aberrant propensity to commit sexual assault, trial court's propensity determination was appropriate).

*State v. Aguilar*, 209 Ariz. 40, 97 P.3d 865, ¶ 28 (2004) (court concluded that non-consensual heterosexual contact between adults could show aberrant sexual propensity).

*State v. Arner*, 195 Ariz. 394, 988 P.2d 1120, ¶¶ 2 (Ct. App. 1999) (defendant was charged with molesting 10-year-old boy; at pretrial hearing, psychologist testified that defendant's molestation of 11-year-old boy 3 years earlier was recent enough to have predictive value and would show that defendant had a continuing propensity to commit similar acts).

**404.c.1.B.cr.020** The court may admit evidence of a remote or dissimilar other act if there is a reasonable basis to infer from defendant's commission of the other act that defendant had an aberrant sexual propensity, and although this reasonable basis may be shown by means of expert testimony or otherwise, expert testimony is no longer required in all cases of remote or dissimilar acts.

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*State v. Arner*, 195 Ariz. 394, 988 P.2d 1120, ¶¶ 2–5 (Ct. App. 1999) (defendant was charged with molesting 10-year-old boy; at pretrial hearing, psychologist testified that defendant's molestation of 11-year-old boy 3 years earlier was recent enough to have predictive value and would show that defendant had a continuing propensity to commit similar acts; trial court admitted evidence of prior act at trial, but psychologist did not testify at trial; defendant contended trial court erred in admitting evidence without having psychologist testify; court noted that, under Rule 404(c), such testimony is no longer required).

### Paragraph (c)(1)(C) — Character evidence in sexual misconduct cases—Balancing against probative value.

404.c.1.C.cr.010 Before admitting evidence of another act in a sexual misconduct case, the trial court must find that the probative value of the other act evidence is not substantially outweighed by the danger of unfair prejudice, and in making that determination, the trial court may consider the remoteness of the other act, the similarity or dissimilarity of the other act, the strength of the evidence that defendant committed the other act, the frequency of the other acts, the surrounding circumstances, any relevant intervening events, any other similarities or differences, and any other relevant factors.

*State v. Lehr*, 227 Ariz. 140, 254 P.3d 379, ¶¶ 19–20 (2011) (state presented expert testimony and trial court found evidence provided reasonable basis to infer defendant had character trait giving rise to aberrant sexual propensity to commit violent and sexual acts against non-consenting females, and trial court found probative value was not substantially outweighed by danger of unfair prejudice).

*State v. Dixon*, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 12–16 (2011) (defendant was convicted of felony murder with sexual assault as charged predicate felony; trial court admitted evidence that defendant had prior conviction for sexual assault; because defendant had been out of custody for only about 1 year before date of charged offense, and because defendant repeatedly intimated sex between victim and himself was consensual, and because circumstances of prior sexual assault and charged offense were strikingly similar, trial court did not abuse discretion in finding probative value was not substantially outweighed by danger of unfair prejudice).

*State v. Arner*, 195 Ariz. 394, 988 P.2d 1120, ¶¶ 6–9 (Ct. App. 1999) (defendant charged with molesting 10-year-old boy; witness testified that, 3 years earlier when he was 11 years old, he and defendant were watching television and defendant rubbed witness's penis through his clothes, whereupon witness became frightened and tried to leave, but defendant stepped in front of him, told him not to go, and offered him money to take off his shorts; officer testified that he arrested defendant for child molestation and false imprisonment; defendant contended evidence that he tried to detain witness was unfairly prejudicial; court held that, assuming admission of that evidence was error, any error was harmless because it was not inflammatory and there was no suggestion that defendant used violence).

### Paragraph (c)(1)(D) — Character evidence in sexual misconduct cases—Specific findings.

404.c.1.D.cr.010 The court must make findings for each of each of these factors in subsection (c)(1)(A), (B), and (C).

*State v. Aguilar*, 209 Ariz. 40, 97 P.3d 865, ¶ 33 (2004) (trial court made findings, but court concluded that evidence trial court considered was not sufficient to make necessary finding).

## RELEVANCY AND ITS LIMITS

*State v. Marshall*, 197 Ariz. 496, 4 P.3d 1039, ¶7 (Ct. App. 2000) (trial court denied defendant's motion to sever two counts alleging sexual conduct with minor in March 1995 with 16 counts alleging sexual conduct with same minor over 4-day period in October 1996; court concluded evidence of 16 counts would have been admissible at separate trial on other two counts, and because this evidence was of acts against same victim, evidence was highly probative, thus any error in not making required findings was at most harmless error).

### Paragraph (c)(2) — Character evidence in sexual misconduct cases—Instructions.

404.c.2.cr.010 If the trial court admits character evidence in a sexual misconduct case, the trial court must give a limiting instruction.

*State v. Arner*, 195 Ariz. 394, 988 P.2d 1120, ¶¶ 10–11 (Ct. App. 1999) (defendant was charged with molesting 10-year-old boy; trial court admitted evidence that defendant had molested 11-year-old boy 3 years earlier; trial court instructed jurors as follows: "Evidence of other acts of the Defendant has been admitted in this case. You must not consider this evidence to prove the Defendant's character or that the Defendant acted in conformity with that character. You may, however, consider that evidence only as it relates to the Defendant's motive or emotional propensity for sexual aberration.").

404.c.2.cr.040 Instructing jurors that they may consider the defendant's other acts to show an emotional propensity for sexual aberration is not a comment on the evidence.

*State v. Arner*, 195 Ariz. 394, 988 P.2d 1120, ¶¶ 10–11 (Ct. App. 1999) (defendant was charged with molesting 10-year-old boy; trial court admitted evidence that defendant had molested 11-year-old boy 3 years earlier; trial court instructed jurors that they could consider other act evidence to show motive or emotional propensity for sexual aberration; court rejected defendant's contention that, without expert testimony explaining emotional propensity, instruction was comment on evidence).

404.c.2.cr.050 Because Rule 404(c) allows the jurors to consider the defendant's other acts to prove the defendant's character trait giving rise to an aberrant sexual propensity and to show action in conformity with that character trait, it is incorrect to instruct the jurors that they may not use such evidence to prove character or actions in conformity with character.

*State v. Arner*, 195 Ariz. 394, 988 P.2d 1120, ¶ 13 (Ct. App. 1999) (defendant was charged with molesting 10-year-old boy; trial court admitted evidence that defendant had molested 11-year-old boy 3 years earlier; trial court instructed jurors that they must not consider evidence to prove defendant's character or actions in conformity with character, but could consider such evidence to show motive or emotional propensity for sexual aberration; court held it was illogical to instruct jurors that they could not use evidence to prove character or actions in conformity with character, but any error worked in defendant's favor).

### Paragraph (c)(3) — Character evidence in sexual misconduct cases—Disclosure.

No Arizona cases.

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### Paragraph (c)(4) — Character evidence in sexual misconduct cases—Sexual offenses.

404.c.4.cr.010 In enacting Rule 404(c), the Arizona Supreme Court intended to broaden the types of sexual offenses in which other act evidence might be admissible, thus the type of sexual offenses is not limited to only those previously admissible under *McFarlin*, and instead includes any offense that is included in A.R.S. § 13-1420.

*State v. Aguilar*, 209 Ariz. 40, 97 P.3d 865, ¶¶ 20–28 (2004) (defendant was charged with three counts of sexual assault against three different victims, and state moved to consolidate trials; because A.R.S. § 13-1420 includes offenses involving non-consensual heterosexual contact between adults, such evidence is admissible under Rule 404(c)).

404.c.4.cr.020 In enacting Rule 404(c), the Arizona Supreme Court intended to broaden the types of sexual offenses in which other act evidence might be admissible, thus the type of sexual offenses is not limited to only those included in A.R.S. § 13-1420, and instead includes any offense that was previously admissible under *McFarlin*.

*State v. Williams*, 209 Ariz. 228, 99 P.3d 43, ¶¶ 24–39 (Ct. App. 2004) (defendant was charged with public sexual indecency based on his stopping car next to 14- and 15-year old victims and masturbating in car; trial court admitted for identification purposes evidence of four other acts when defendant was seen masturbating in car; court held that, because prior case law held that evidence of public sexual indecency was admissible as sexual propensity evidence, it was still admissible, even though public sexual indecency was not included in A.R.S. § 13-1420).

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